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THE
ONTARIO LAW REPORTS

CASES DETERMINED IN THE SUPREME COURT
OF ONTARIO (APPELLATE AND HIGH
COURT DIVISIONS).

1915.

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JUDGES
OF THE
SUPREME COURT OF ONTARIO
DURING THE PERIOD OF THESE REPORTS.

APPELLATE DIVISION.

First Divisional Court.

THE HON. SIR WILLIAM RALPH MEREDITH, C.J.O.
“ “ JAMES THOMPSON GARROW, J.A.
“ “ JOHN JAMES MACLAREN, J.A.
“ “ JAMES MAGEE, J.A.
“ “ FRANK EGERTON HODGINS, J.A.

Second Divisional Court.

THE HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.
“ “ WILLIAM RENWICK RIDDELL, J.
“ “ FRANCIS ROBERT LATCHFORD, J.
“ “ HUGH THOMAS KELLY, J.
“ “ JAMES LEITCH, J.

HIGH COURT DIVISION.

THE HON. SIR JOHN ALEXANDER BOYD, C., K.C.M.G.
“ “ SIR WILLIAM MULOCK, C.J.Ex., K.C.M.G.
“ “ RICHARD MARTIN MEREDITH, C.J.C.P.
“ “ BYRON MOFFATT BRITTON, J.
“ “ ROGER CONGER CLUTE, J.
“ “ ROBERT FRANKLIN SUTHERLAND, J.
“ “ WILLIAM EDWARD MIDDLETON, J.
“ “ HAUGHTON LENNOX, J.

ERRATA

Page 253, last line of head-note, and page 254, 3rd line from bottom, for
"509" read "409."

" 262, 3rd line of head-note, for "if" read "it."

" 512, line 19, for "31" read "30."

MEMORANDA

CALL TO THE BAR

In Easter Term, 1915, the following ladies and gentlemen were called to the Bar:—

John Henry Naughton, Leonard Charles Jarvis, Sydney Ellis Wedd, Richard Alan Olmsted, Frederick Coverdale Richardson, Arza Clair Casselman, James Morgan Riddell, Maxwell Cline Purvis, James Fordyce Strickland, John Vincent Guilfoyle, Duncan McArthur, Hugh Williamson Macdonnell, Fred Holmes Barlow, Norman Alexander Keys, John Calvin MacFarlane, George Edward Edmonds, Stanley Meredith Scott, Frederick Armstrong Addison Campbell, Edith Louise Paterson, Colin Fraser Elliott, William Batten McPherson, Charles Francis Leonard, Harold Ernest Manning, John Ure Garrow, Gordon Burgess Jackson, Wilfred Wright Parry, Roland Oliver Daly, John Steuart Duggan, William Allan McCarthy, Mary Elizabeth Laughton, Arthur Herbert Plant, William Sargent Montgomery, Arthur Howard Robertson, Paul Lyndon Armstrong, Elmer McLeod Rowand, Kenneth Bruce Maclaren, Hume Blake junior, William Hughes Beatty, Charles Harold Watson, William George Hanna, Colin William George Gibson, Donald Black Sinclair.

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REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT OF ONTARIO

(APPELLATE AND HIGH COURT DIVISIONS).

[IN CHAMBERS.]

RE CITY OF OTTAWA AND PROVINCIAL BOARD OF HEALTH.

1914

Dec. 28.

Provincial Board of Health—Approval of Plans and Specifications for System of Municipal Water Supply—Statutory Duty of Board—Disapproval of Source of Supply—Ultra Vires—Public Health Act, 2 Geo. V. ch. 58—Special Act 4 Geo. V. ch. 84—Jurisdiction of Court—Mandamus.

To secure an improved water supply for the City of Ottawa, two different schemes were in 1912 and 1913 recommended by engineers: (1) the taking of water from the Ottawa river and purifying it by mechanical filtration; (2) bringing water from a distant lake, at much greater expense. Plans and specifications for the carrying out of both schemes were approved by the Provincial Board of Health. By an Act of the Ontario Legislature, 4 Geo. V. ch. 82, assented to on the 20th March, 1914, a vote was directed to be taken on the 20th March for the purpose of ascertaining whether the ratepayers desired an improved water supply, and which of the two schemes was favoured by the ratepayers. The vote was taken, with the result that a majority voted for the river scheme. The Legislature then passed another Act, 4 Geo. V. ch. 84, assented to on the 1st May, 1914, providing that the city corporation should forthwith proceed to procure and submit to the Board general plans and specifications in accordance with the report recommending the river scheme; and that, upon approval being given by the Board of such plans and specifications, with such changes as might be deemed necessary by the Board, the corporation should pass by-laws for the construction of the works and the borrowing of money to defray the cost. By sec. 5 it was provided that if the Board refused to approve of the plans and specifications, the corporation should forthwith proceed to carry out the works recommended by the report in regard to the lake scheme. A new report and plans and specifications for carrying out the river scheme were then prepared and submitted to the Board; and the Board, by its report of the 18th September, 1914, refused "to approve of the plans, specifications, and report upon an improved water supply by way of mechanical filtration of the Ottawa river." The Board's report contained reasons for the decision, and the members of the Board were examined upon a motion made by the city corporation for a mandamus, and individually stated their reasons:—

Held, upon the evidence so obtained, that the Board had acted upon the assumption that it was justified in refusing to approve of the plans and specifications because it did not approve of the river scheme; and that

1914

RE
CITY OF
OTTAWA
AND
PROVINCIAL
BOARD OF
HEALTH.

the Board had gone beyond what was referred to it by the statute when it assumed to reject the river scheme approved by the ratepayers.

And *held*, that the Court had jurisdiction to make and should make a peremptory order of mandamus requiring the Board to consider the plans and specifications for the carrying out of the river scheme and to approve or disapprove the same without regard to its opinion of the source of supply.

The Board, acting under the Public Health Act, 2 Geo. V. ch. 58, and under the special Act 4 Geo. V. ch. 84, is not to be regarded as a mere emanation from the Crown; it is a body created for the discharge of important administrative and quasi-judicial functions—a public authority performing a statutory duty.

Rex v. Board of Education, [1910] 2 K.B. 165, 178, and *Rex v. Lords Commissioners of His Majesty's Treasury*, [1909] 2 K.B. 183, followed.

Graham v. Commissioners for Queen Victoria Niagara Falls Park (1896), 28 O.R. 1, distinguished.

MOTION by the Corporation of the City of Ottawa for a peremptory order of mandamus directing the Provincial Board of Health to consider certain plans and specifications prepared for the applicants under the authority of the statute 4 Geo. V. ch. 84 (O.), an Act respecting the City of Ottawa, and submitted for the approval of the Board.

November 24. The motion was heard by MIDDLETON, J., in Chambers.

Wallace Nesbitt, K.C., and *T. A. Beament*, for the applicants.

Edward Bayly, K.C., for the Provincial Board of Health, relied on sec. 9 of the Act as an answer to the application.

December 28. MIDDLETON, J.:—The questions arising on this motion are important and difficult, and for them to be properly understood it is necessary to set forth at some length the facts disclosed upon the material.

The water supply for the city of Ottawa has been polluted and unsatisfactory, and for some years the question of securing a sufficient and satisfactory supply has been not only before the people but before the Legislature and the Courts.

The earliest document produced on the present application is a letter from the chief officer and secretary of the Provincial Board of Health, Dr. McCullough, to the Waterworks Committee of the City of Ottawa, dated the 23rd July, 1912. This letter is as follows:—

“I have the honour to report herewith my opinion in respect to the proposed water purification work for the City of Ottawa, as follows:—

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"1. That the best plan whereby the Ottawa river water may be successfully treated is by means of mechanical filtration.

"2. That, considering the whole question of the site of such works, I believe that Lemieux Island is the best one, for many reasons, amongst which I might mention: (1) that the site is ample; (2) it is immediately available; (3) a great deal of preliminary and expensive work has already been done upon this site in connection with plans already made, and which may be utilised.

"3. To ensure the absolute impossibility of any future contamination in the conveyance of water from the filters to the pumping station, a water tunnel, such as that in use at Toronto, should form part of the scheme.

"4. I do not consider that any further time should be lost in investigating any other scheme.

"5. That the city should at once instruct a competent mechanical filtration engineer to prepare plans and estimates for this system."

To appreciate the significance of this letter, in view of what took place later, it is important to bear in mind that it looks to the Ottawa river as the source of supply, and to the treatment of the river water by mechanical filtration.

The municipal council thereupon consulted Mr. Allen Hazen and asked him to report upon the best method of complying with the instructions of the Board, and on the 18th November, 1912, Mr. Hazen reported in favour of a scheme for taking river water from a point north of Lemieux Island, above the Canadian Pacific Railway bridge, and then treating the water mechanically and chemically so as to secure the necessary purification. This treatment involved the use of hypochlorite of lime as a purifying agent.

Doctor Hazen's report was submitted to the Provincial Board of Health, and on the 23rd November the Chairman and chief officer certified that the Board had approved of the plans and specifications as prepared by Hazen.

The new council, elected at the beginning of January, 1913, was not content with the scheme proposed, and early in that year employed Sir Alexander Binnie and Dr. Houston to in-

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investigate and report upon the whole question. By their report, dated the 9th October, 1913, these gentlemen reported in favour of a scheme for bringing water from certain lakes in the Province of Quebec, at very much greater expense than that contemplated by any scheme for taking water from the Ottawa river. The source of supply being superior, no filtration or chemical treatment would be necessary. This scheme being submitted to the Provincial Board, on the 15th October the Board gave its approval.

In the meantime an Act had been obtained by the city, 3 & 4 Geo. V. ch. 109 (O.), authorising the city to borrow \$5,000,000 to provide for the construction of the contemplated scheme, and authorising the corporation to go into the Province of Quebec for the purpose of obtaining water from the lakes in that Province. I understand that legislation was also obtained from the Province of Quebec authorising the construction of works in that Province.

A by-law was passed for the purpose of borrowing \$5,000,000, although the report of the engineers shewed that the undertaking recommended would cost about \$8,000,000. This by-law was quashed by my brother Lennox, upon the ground that the statute authorised the borrowing of \$5,000,000 for the purpose of constructing and completing works, and did not authorise the borrowing of \$5,000,000 for the purpose of embarking in a much more expensive scheme: *Re Clarey and City of Ottawa* (1913), 5 O.W.N. 370.

On the 1st December, 1913, the Provincial Board of Health gave notice to the municipality, under the authority of the Public Health Act, requiring the municipality forthwith to pass by-laws necessary for the undertaking of the work. In supposed compliance with this, another by-law was passed, and this in its turn was also quashed by my brother Lennox: *Re Clarey and City of Ottawa* (1914), 5 O.W.N. 673.

On the 1st February, 1914, Mr. Archibald Currie, the City Engineer of the City of Ottawa, prepared a further report upon the question, looking to the Ottawa river as a source of supply. His scheme differed from the scheme put forward by Mr. Hazen, mainly in the method of bringing the water from the source of

supply to the pumping station. Mr. Currie takes the water from a point not far from that contemplated by the original scheme, but, instead of conveying it by a tunnel under the bed of the river to the pumping station, he takes it by pipe lines carried on trestles. The scheme involves filtration and chemical treatment; the costs of the work outlined being estimated at something under \$2,000,000.

Application was made to the Legislature to put an end to all difficulties in connection with what had grown into a somewhat acrimonious dispute. This resulted in the passing of two Acts, 4 Geo. V. ch. 82 (O.), assented to on the 20th March, 1914, and 4 Geo. V. ch. 84 (O.), assented to on the 1st May, 1914.

Under the earlier Act, a vote was directed to be taken on the 30th March for the purpose of ascertaining whether the rate-payers desired an improved water supply, and which of the two contemplated sources of water supply was favoured by the rate-payers; the two schemes submitted being that recommended by Sir Alexander Binnie for the bringing of water from the lakes in the Province of Quebec, and that favoured by the City Engineer, involving the mechanical filtration of the Ottawa river water and its subsequent chemical treatment. The result of this vote shewed a majority in favour of the less expensive scheme of mechanical filtration.

The second Act was then passed. It recites that, in the opinion of the Provincial Board of Health, it is necessary that an improved waterworks system should be established for the City of Ottawa, that the city have procured plans and specifications and an engineer's report from Sir Alexander Binnie, that the plans, specifications, and report had been approved by the Provincial Board of Health, and that that Board had approved of the source of supply, and the carrying out of works as recommended by the report. The preamble then recites that the corporation had also had a report upon a water supply and works prepared by Mr. Currie, providing as the source of supply a point in the Ottawa river, and providing for the subsequent mechanical filtration of the water. The result of the voting taken under the earlier Act was set out. It is then enacted (1) that the corporation "shall forthwith proceed to procure and submit

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to the Provincial Board of Health general plans and specifications in accordance with the report of Archibald Currie, C.E.," etc.; (2) upon approval being given by the Provincial Board of Health of such plans and specifications, with such changes and variations as may be deemed necessary by the Board, the corporation shall pass by-laws for the construction of the works and the borrowing of \$2,000,000 to defray the cost. Provisions then follow that, in the event of the corporation failing to pass the by-law within one month after receipt of the approval by the Board of the plans and specifications, the Board may exercise the powers of the corporation and itself proceed to construct the works.

By sec. 5 it is provided that "if the Provincial Board of Health refuses to approve of the plans and specifications mentioned in section 1," the corporation shall forthwith proceed to carry out the works recommended by Sir Alexander Binnie; and (sec. 6) may borrow \$8,000,000 for that purpose.

Upon the passing of this Act, the city asked Mr. Hazen to prepare plans and specifications for the carrying out of the work recommended by Mr. Currie's report, and on the 19th August, 1914, Mr. Hazen reported, and submitted the necessary plans and specifications. These were in due course submitted to the Provincial Board, and that Board, by its report of the 18th September, 1914, "unanimously refuses to approve of the plans, specifications, and report upon an improved water supply by way of mechanical filtration of the Ottawa river, referred to in section 1 of the Act."

It will be noticed that the Provincial Board has not followed the wording of sec. 5, and that its refusal is not merely to approve of the plans and specifications, but is also a refusal to approve of the report recommending the filtration of the river water.

The action of the Board is now attacked, upon the ground that it has usurped a function not entrusted to it when it undertook to consider the report, and that its decision, which involves the rejection of the Ottawa river as the source of supply, is *ultra vires*, and upon the ground that the Board has refused to exercise the functions which it is called upon to discharge, in that

it has refused to consider merely the plans and specifications submitted for the purpose of carrying out the scheme which, it is said, the Legislature has itself approved.

In order to understand the precise situation, it is necessary to refer to the earlier part of the report made by the Provincial Board. Having set forth the Act *in extenso*, the report proceeds as follows:—

“Having due regard to the great importance of the question of a proper supply for the City of Ottawa, in view of the two serious epidemics of typhoid which have been experienced, and of the position of that city as the capital of the Dominion, the members of the Board have given these plans and specifications exceptional consideration and have made a personal study of the subject upon the ground. They have had the advantage of the opinion not only of the expert water engineers and others employed by the city, but also of the best independent advice obtainable.

“The Board has not considered it proper to compare these plans and specifications with those prepared by Sir Alexander Binnie, and also referred to in the said Act, with a view to deciding as between the relative merits of the two proposals, but has conceived its duty to be either to approve or refuse to approve of the plans, specifications, and report upon an improved water supply by way of mechanical filtration of the Ottawa river, upon their own merits. In so doing, however, the Board has not been able to ignore the outstanding fact that the Binnie report has already received its approval, and is one which provides for a supply of unquestionably pure water from a source and in a manner pre-eminently satisfactory to the Board, having regard to the safeguarding of the public health.

“The Ottawa river is, beyond any question, a polluted source of supply at all points in the vicinity of the city of Ottawa. The character of this pollution was pointed out in the report of the 25th November, 1911, made by Mr. Allen Hazen and others, as well as in other reports of later date made by the said gentleman and others, and all experts agree that the danger of pollution is continually increasing. The fact that it is an inter-provincial stream renders the control of its pollution all the more difficult.

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“The Board understands it to be a fact that the people of Ottawa have been led to believe that treatment of the Ottawa river by mechanical filtration will relieve them of the further use of hypo-chlorite of lime. In reference to this question, Mr. Hazen, in his statement before the Board, said that chlorination would be constantly required, and that the use of chlorine as well as the administration of chemicals and control of the plant must at all times be under the most careful and unremitting expert supervision.

“While the Board is sensible of the value of chlorination of polluted water as an emergency measure, despite the objectionable taste usually associated with its administration, it feels that it would not be doing its duty to the citizens of Ottawa or to the general public of Canada who may have occasion to visit the capital city, by countenancing the use of a water which, after mechanical filtration, constantly requires chlorination, when a pure and adequate supply, requiring no treatment whatever, may be readily procured.

“In view of these unanswerable reasons, the Board’s decision is as follows:—

“The Provincial Board of Health unanimously refuses to approve of the plans, specifications, and report upon an improved water supply by way of mechanical filtration of the Ottawa river, referred to in section 1 of the Act.”

It is argued from this that the Board, in the first place, rightly defines its own duties when it says that it is not authorised to decide the merits of the two proposals, “but has conceived its duty to be either to approve or refuse to approve of the plans, specifications, and report upon an improved water supply by way of mechanical filtration of the Ottawa river, upon their own merits.” The introduction of the word “report,” not found in the statute, indicates an intention to enlarge somewhat the sphere of its functions; but it is said that all that follows indicates a repudiation of that idea, and that the “unanswerable reasons” for the Board’s decision indicate that the refusal to approve is because of the preference of the Board for the Quebec lake scheme.

The different members of the Board have been examined for

the purpose of shewing that this charge was well-founded. These examinations make the situation so plain that extracts may well be made.

Dr. J. W. S. McCullough, the chief officer and secretary of the Board, says:—

“Q. 63. Because there was such a supply as the Thirty-one Mile Lake supply that did not require filtration, according to the report of Sir Alexander Binnie, the Board determined that the City of Ottawa would be better with that supply than with a filtration supply? A. Undoubtedly.

“Q. 64. The plans and specifications, I suppose, that Mr. Hazen prepared were good plans—I mean they were the best plans that could be prepared for a filtration system according to the Currie report? A. I have nothing to say against his plans.”

“Q. 83. You were pretty well prejudiced against the filtration of the Ottawa river water when you knew of this bubbling lake supply which could be obtained without filtration? A. Yes; anybody would be that knew anything about water.”

“Q. 93. Now, your Board, in approaching the consideration of this, considered it as part of your duty to determine as to whether the Ottawa river filtered was equal to the Thirty-one Mile Lake scheme as referred to in the Act of last session? A. No, we did not; we specifically state in our report about it here what we thought.”

“Q. 95. But you did in your findings deal with the matter of turning down the Ottawa river proposition by reason of the consideration of the sources of supply and the plans and specifications? A. We stated our reason in this report.

“Q. 95A. Did you or did you not consider the fact that the Ottawa river was a polluted stream? A. Certainly.

“Q. 96. And that the Thirty-one Mile Lake scheme was one that would not require filtration, and that therefore it was a better scheme in your opinion? A. Undoubtedly.

“Q. 97. If the Ottawa river water scheme had been the only scheme available, I suppose you would have done what you did in 1912? A. We could not help ourselves.”

Doctor Weagant:—

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“Q. 4. You know, under sec. 1 of that Act, that the city was directed to procure and submit to the Provincial Board of Health general plans and specifications in accordance with the report of Archibald Currie of the 21st February, 1914? A. Yes.

“Q. 5. For a mechanical filtration plant to filter the water of the Ottawa river? A. Yes.

“Q. 6. I understand that plans and specifications were submitted to the Board, either some time towards the end of August or early in September, 1914? A. Yes.

“Q. 7. In conformity with the provisions of the Act? A. Yes.

“Q. 8. Were those plans that were submitted and the specifications that went with them, in accordance with the general report of Archibald Currie, referred to in the Act, or not, do you know—were the plans and specifications prepared for the scheme provided for in Archibald Currie’s report? A. Yes, I believe they were.

“Q. 9. And they were for a system for the purpose of filtering the Ottawa river by way of mechanical filtration? A. Yes.

“Q. 10. And by a finding of the Provincial Board of Health, dated the 18th September, 1914, those plans were rejected? A. Yes—well I don’t know whether I will just say the plans were rejected. The mechanical filtration of the Ottawa river water was disapproved of.

“Q. 11. That, as I understand it, was by reason of the fact that another supply of water from Thirty-one Mile Lake referred to in the Act of last session was considered to be more satisfactory for the City of Ottawa? A. Yes.

“Q. 12. The plans themselves were good plans, I suppose, as far as the plans went, as far as you know? A. As far as I know, I should judge they were. I have sufficient confidence in the firm that prepared them to believe they were probably as good as any plans of the kind could be made.

“Q. 13. So that it wasn’t a question of the insufficiency of the plans; it was a question of the source of supply and the character of the Ottawa river water that you objected to? A. Partly—principally, yes. I was going to say there were features in connection with the thing we did object to.”

“Q. 27. I think in the two schemes, the Lemieux Island scheme of 1912 and the Currie scheme of 1914, there were two main differences: one was the intake was placed further up the river in the Currie scheme and the clear water pipe was carried over land? A. Yes, those were the two main points. They were practically the same as far as the filtration process went.”

“Dr. W. H. Howey:—

“Q. 6. Upon what pretext or grounds were the plans and specifications submitted by the City of Ottawa disallowed? A. Because it was not giving Ottawa pure water. It was giving them doped or chlorinated water for all time to come.

“Q. 7. According to the plans and specifications for the Ottawa river scheme, the water should be treated by chlorine? A. It would have to be chlorinated after being filtered.

“Q. 8. If the water in the Ottawa river, under the Currie scheme, had been considered as good water as Thirty-one Mile Lake water, would the plans and specifications be satisfactory to the Board for the delivery of it to the City of Ottawa? A. The construction of the plans, I presume, would be all right to carry the water, but it was what the pipes and so on were carrying.

“Q. 9. The sole factor in leading the Board to disallow the plans and specifications according to the Currie scheme was because the Ottawa river water was polluted, and, before it was fit to deliver to the public in the city of Ottawa, would require filtration and subsequent chlorination? A. Yes.

“Q. 10. Was there any objection to the method of treating the Ottawa river water according to the plans and specifications laid before you? A. There were none, provided there were no alternative source for pure water.

“Q. 11. You mean by that, Dr. Howey, that the plans and specifications for the treatment of the water were complete in themselves, but because the water was such that it required that treatment you refused to pass or allow the plans and specifications? A. Yes, that is correct.

“Q. 12. You felt as a member of that Board, Dr. Howey, that it was your duty towards the public who would use this water not to permit the supply to come from the Ottawa river because such supply was polluted? A. Yes.

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“Q. 13. And, comparing the Ottawa river supply with the Thirty-one Mile Lake supply, you disallowed the Ottawa river scheme and favoured the Thirty-one Mile Lake water? A. Yes.

“Q. 14. And you would have disallowed any plans and specifications which provided for the taking of Ottawa river water anywhere in the vicinity of the intake, according to the Currie scheme? A. Yes.

“Q. 15. I may be stating the matter fairly then, when I say that the reasons which guided the Board of Health in disallowing the plans and specifications submitted by the City of Ottawa for the Ottawa river scheme, was solely on account of impurity of supply under that scheme? A. Yes; when there was another purer supply obtainable which required no treatment.”

“Q. 18. The plans and specifications were not considered by the Board from any standpoint of their own appropriateness? A. Well, they were examined and gone over, but of course if these plans and specifications had been able to deliver water which would be pure, and not “doped” so to speak, why we would have gone into the matter in detail perhaps more, but we first of all had to reject them on these grounds, but the bill did not provide for any chlorination. The bill only permitted the mechanical filtration, not subsequent chlorination. The people of Ottawa would, no doubt, have rejected it themselves. They would have no use for chlorinated water for all time to come. Another point I would like to add is, that, being the capital of Canada, numerous persons coming to town to transact business with the Government, and for reasons incidental to the establishment of Government offices there, and we wanted to be doubly sure of a pure supply of water for Ottawa on that account as well. Had the plans and specifications, with mechanical filtration of the Ottawa river water, delivered water to the public which was not “doped” or chlorinated, the Ottawa river water would probably have been chosen, but when the plans and specifications disclosed the fact that, in addition to mechanical filtration, the water had to be chlorinated as part of that scheme to make it safe, the Board rejected such scheme. I might also add that the plans and specifications of the Currie scheme necessitated the diligent care and attention of expert men in the treat-

ment of the water, whose duties were such that any negligence might mean delivering, to the city, water which would cause disease."

Dr. James F. Roberts:—

"Q. 6. Were those plans in accordance with the general report of Mr. Currie mentioned in the Act? A. Yes, the plans were plans drawn by Messrs. Hazen & Fuller for the scheme for the mechanical filtration of the Ottawa river in accordance with this report of Mr. Currie's.

"Q. 7. And the plans themselves—I suppose you are not an engineer? A. Yes.

"Q. 8. Do I understand that, according to the information from your engineers, the Board's engineer, the plans themselves were satisfactory plans; they were good plans as far as mechanical filtration went? A. They followed the usual plans for mechanical filtration.

"Q. 9. The difficulty, as I understand it, was that, on account of there being another supply referred to in the Act which did not require mechanical filtration, your Board felt that such a supply, i.e., the Thirty-one Mile Lake supply, would be much more satisfactory for the City of Ottawa than this supply? A. Yes.

"Q. 10. Something, of course, was said in your finding of the 18th September last with regard to chlorination? A. Yes.

"Q. 11. Mr. Currie's report, to which we have referred, shewed that there would have to be chlorination, according to his view; you knew that? A. I did not know it.

"Q. 12. Did you ever see Currie's report? A. I cannot say that I did. I think perhaps I did.

"Q. 13. But, as a matter of fact, in his report he does speak of the use of hydrochlorine? A. Yes. It does not necessarily follow because you have mechanical filtration of the Ottawa river that you have to use chlorine.

"Q. 14. But, as a matter of fact, Mr. Currie in his report considers that hydrochlorine would be necessary? A. I remember distinctly at our meeting in which the plans of Mr. Hazen were explained to us and gone over, that I was very careful to ask Mr. Hazen personally whether he meant that, according to

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his plans, he intended the Ottawa river after filtration that it would be as far as he knew at that time perpetually subject to hydrochlorine, and he said 'yes.' "

Q. 21. But, I think, you have already said that where there was a supply available that did not need hydro-chlorine you would prefer that supply? A. Yes, surely. In fact that is, I think, the opinion of most engineers, as well as bacteriologists."

"Q. 26. I suppose, if this Thirty-one Mile Lake scheme had not been under consideration, that you would probably have taken the Ottawa river water filtered? A. We were not considering the Thirty-one Mile Lake, we were really at that time considering the plans. I may say we approved of Lemieux Island plan because there was no other alternative scheme at that time."

"Q. 50. As I said before, I suppose that, if this other water supply had not been found, you would have felt that it would have been a wise thing to have adopted these plans? A. We would have been forced to practically have done something of that kind.

"Q. 51. You would have felt that? A. We might have; perhaps these plans or similar plans.

"Q. 52. You had, as you know, under the Act, the right to suggest alterations? A. Yes.

"Q. 53. You did not deem it necessary to do that; apparently you have not made any suggestions or alterations? A. No.

"Q. 54. That was because these plans, I suppose, were satisfactory if you had been willing to adopt the scheme of filtering the Ottawa river? A. Of course, I would not want by that to say that they were satisfactory so that they could not be improved on.

"Q. 55. Possibly not, but I am saying that, had it not been that you were not prepared to approve the Ottawa river scheme, then you might possibly have suggested some slight alterations which might or might not have improved the plant? A. Yes.

"Q. 56. But, because you did not approve the Ottawa river filtration scheme, there was no necessity for making any suggestions? A. We did not approve the source of supply at all.

"Q. 57. Therefore it would have been useless for your Board to have suggested alterations in the plant? A. Surely.

“Q. 58. It would have been a waste of time? A. Yes.

“Q. 59. You went up to Thirty-one Mile Lake? A. Yes.

“Q. 60. I mean shortly before the finding of the 18th September? A. Yes.

“Q. 61. What did you go up there for? A. We did not only go up to Thirty-one Mile Lake, we went over the Ottawa river, we went over the whole situation.

“Q. 62. Why did you go to Thirty-one Mile Lake? A. At the meeting of the Board on Saturday morning, the Board of Control—certain members of the Board of Control—of Ottawa made some very strong statements, made a very strong indictment of Thirty-one Mile Lake, spoke of it being a tamarack swamp and all that sort of thing. I confess, myself, that, after one of them got through, I could not conceive of it ever being considered a source of water supply at all; that is the idea I had of it; I thought it was quite right, after what he said and others said with regard to Thirty-one Mile Lake, that we should, if possible, disabuse our minds of these ideas.

“Q. 63. So you went up and looked at it? A. We went up and looked at it.”

Dr. H. R. Casgrain:—

“Q. 7. What action did the Board take? A. They wouldn't adopt the plans for the filtration of the Ottawa river, because they wouldn't purify the water, because they had to hydrochlorate the water after it was filtered just the same; they had the other alternative of taking a fresh supply of water from Thirty-one Mile Lake, that was the alternative.

“Q. 8. It was on account of the alternative that you refused to accept these plans? A. Yes, on account of the hydrochlorating of the water; that was the principal thing; where we could get the purer water supply without resorting to chlorating for its filtration, we took the Thirty-one Mile Lake; also due to the fact that Mr. Hazen reported as follows” (refers to exhibit 1, printed report dated the 25th November, 1911).

“Q. 12. It wasn't that you had any objection to the plans as plans? A. No, but the result; notwithstanding it was filtered through this elaborate process of filtration, the water had to be hydrochlorated in order to kill the germs; and then, you see,

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they had to have a regular staff of chemists at the water office to test the water, either add, diminish, or increase the amount of hydrochlorate according to the number of germs they found per cubic centimetre.

“Q. 13. Is it correct to say that you didn’t go into the details at all—you considered the source of supply? A. The plans were discussed two days.

“Q. 14. Was any objection taken to the plans? A. Not as to the plans *per se*, but as to the results obtained due to the source.

“Q. 15. And during the time that the plans were before you for consideration, did the Board examine as to both sources? A. Sure; we went to Ottawa and examined the Thirty-one Mile Lake supply, and then we went to the place where they are going to put the intake in the Ottawa river, examined that thoroughly, and came to the conclusion then; it was right in a thickly populated part, thickly populated both above and below the intake, and the sewage was dropped right into the intake; and another thing that we objected to, with this filtration system, the water would still be discoloured, red colour, wouldn’t look clean, a red colour to it.

“Q. 16. That wasn’t due to any defect in the plans? A. Not the plans, but it is due to the action of the hydrochlorate on the pipes; that red tinge was the chemicals.

“Q. 17. Then the Board did not suggest any change in detail in regard to the plans? A. No; the plans were as plans, but they were rejected as plans.

“Q. 18. If the source had been all right you would have had no objection to the plans? A. If we hadn’t had any alternative, or if the source had been all right, we would have had no objection to the plans; they are used all right, but when there is any alternative, you can’t get to the Mississippi, or the Albany, or the Hudson; they use the plans there, but it is forcing on the public the hydro-chlorate for all the rest of their days.”

From all these extracts it is quite apparent that the Board has acted upon the assumption that it was justified in refusing to approve of the plans because the scheme propounded by Mr. Currie did not meet with the approval of the Board.

At the outset, I desire to make it plain that, whatever the functions of the Board may be, I have no right to consider, and do not consider, the merits or demerits of these schemes. It is manifestly a matter of vital importance that the City of Ottawa should secure a proper water supply. Whether it is necessary to spend \$2,000,000 or \$8,000,000 for that purpose must be determined by those upon whom the responsibility is placed.

The Legislature submitted the choice of the schemes to the ratepayers. They chose the less expensive scheme. By this Act the Legislature has entrusted the Board of Health with certain duties, and I must determine, upon the construction of the Act, whether the Board was given power to review the action of the ratepayers and to disallow the scheme of which the ratepayers have expressed their approval, or whether the Board was only given the more limited power of dealing with plans and specifications submitted for the carrying out of the approved scheme.

In view of the near approach of another session of the Legislature, my responsibility is somewhat reduced, as, if I misinterpret the intention of the Legislature, or if the Legislature should be of opinion that, in view of the strongly expressed feeling of the Provincial Board, any scheme which makes the Ottawa river the source of supply is imprudent and should be disallowed, the Legislature may well exercise its sovereign power, and authoritatively and finally deal with the whole question.

Turning to the Public Health Act, as found in 2 Geo. V. ch. 58, it will be found that, by sec. 89, whenever the council of any municipality contemplates the establishment of a waterworks system, the plans and specifications, and an engineer's report upon the water supply and upon the work to be undertaken, shall be submitted to the Board. Now, it is to be borne in mind that in this case the engineer's report on the water supply had been submitted both with reference to the Hazen scheme, looking to the Ottawa river, and with reference to the Binnie scheme, looking to the Quebec lakes, and the Board had approved of each of these sources. Plans and specifications in connection with the Binnie scheme had also been submitted, and this fact was referred to in the preamble to the statute. The question of the choice of the source of supply had been submitted to the

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ratepayers, and they had chosen the river scheme. The only thing lacking was the Board's approval of the plans and specifications in connection with the river scheme.

What sec. 1 required was the preparation of these plans and specifications; and what the Board of Health was empowered to do was to approve or disapprove of these plans and specifications. It seems to me that the Board has clearly gone beyond what was referred to it by the statute, when it assumed, as it undoubtedly did, to criticise and reject the engineer's report upon the source of supply.

If it was intended that the Board should have the power to strike at the root of the whole scheme by rejecting the river as the source of supply, it is hardly conceivable that the municipality would have been directed to prepare and submit to the Board detailed plans and specifications which I am told by counsel have cost the municipality upwards of \$30,000.

In endeavouring to interpret the Act, sight must not be lost of the fact that it is conceded in the evidence which I have extracted that Mr. Currie's report was essentially the same as the Hazen report, which already had the *imprimatur* of the Board; the only real difference being the substitution of the overland pipe for the underground tunnel.

These being the facts, the legal situation has yet to be considered. Have I jurisdiction to make the order sought?

What was said by Lord Justice Farwell in *Rex v. Board of Education*, [1910] 2 K.B. 165, 178, is much in point, and I venture to think most accurately states the law here applicable: "Then it was contended that, even if this be so, this Court has no jurisdiction to interfere—the Attorney-General went so far as to say on any ground or in any way whatever. The Solicitor-General qualified the generality of this contention by saying 'unless they have wrongfully given themselves or assumed a jurisdiction that they did not possess.' The Solicitor-General's contention is, in my opinion, the more accurate, but it requires explanation and expansion. The point is of very great importance in these latter days, when so many Acts of Parliament refer questions of great public importance to some Government department. Such department when so entrusted becomes a

tribunal charged with the performance of a public duty, and as such amenable to the jurisdiction of the High Court, within the limits now well established by law. If the tribunal has exercised the discretion entrusted to it *bonâ fide*, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the Courts cannot interfere; they are not a Court of Appeal from the tribunal, but they have power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law, and also the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusion or deciding a point other than that brought before them, in which cases the Courts have regarded them as declining jurisdiction. Such tribunal is not an autocrat free to act as it pleases, but is an inferior tribunal subject to the jurisdiction which the Court of King's Bench for centuries, and the High Court since the Judicature Acts, has exercised over such tribunals. In this case the Board, by acting on a wrong construction of the Act, have not exercised the real discretion given to them thereby."

This is in accordance with the principles stated in many cases. The Board, acting under the Public Health Act and under this Act, is not to be regarded, as the defendants were in *Graham v. Commissioners for Queen Victoria Niagara Falls Park* (1896), 28 O.R. 1, as a mere emanation from the Crown. It is a body created for the discharge of very important administrative and quasi-judicial functions. As put in other cases, it constitutes "a public authority performing a statutory duty:" *Rex v. Lords Commissioners of His Majesty's Treasury*, [1909] 2 K.B. 183; *Commissioners for Special Purposes of Income Tax v. Pemsell*, [1891] A.C. 531; *Regina v. Commissioners for Special Purposes of Income Tax* (1888), 21 Q.B.D. 313.

For these reasons, I think the Board has failed to discharge the precise duty imposed upon it by the statute, and that the mandamus sought should now be granted.

It was suggested that the mandamus ought not to be granted because the Court can in no way control the Board, and that the Board might refuse to approve of the plans, not because they are in themselves in any way defective, but because the Board

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disapproves of the source. I cannot suppose that professional men of the standing of the gentlemen constituting the Board could act otherwise than properly and in the honest discharge of the duty imposed upon them by the statute. If in the result the order I now make stands, the Board will, no doubt, yield obedience to the views expressed.

The case is not one for costs.

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[APPELLATE DIVISION.]

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Will—Construction—Devises—Habendum—Tenants in Common—Estates for Life and in Remainder—Intestacy after Life Estates—Rule against Perpetuities—Double Possibilities—Title by Possession—Limitations Act, R.S.O. 1914, ch. 75, secs. 5, 7(3), 12, 40, 41—Rights of Heirs at Law—Division of Land by Life-tenants in Common—Estoppel—Partition—Reference—Questions of Title—Improvements under Mistake of Title—Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 37.

This action was brought to obtain a declaration of the rights of the parties in respect of 50 arpents of the land devised by the will set forth in the report of *Re Sharon and Stuart* (1906), 12 O.L.R. 605; for partition thereof; for possession; and for general relief. The 50 arpents in question were devised by the testator to his three sons, G., O., and J., "to have and to hold to them as is aforesaid mentioned, provided . . ." In the earlier part of the will there were devises of other lands to sons, "to have and to hold to each of them for and during their natural life respectively, and if they should marry, after their and such of their decease to have and to hold to their surviving wife respectively, and on the demise of their or each of their wives to have and to hold to their children respectively and their heirs forever:"—

Held, by the majority of the Court, that the words "as is aforesaid mentioned" were not to be interpreted as importing into the devise to the three sons a devise to their wives and children: what is "aforesaid mentioned" as to having and holding "to them" is "to have and to hold to each of them for and during their natural life respectively;" and accordingly the three sons took estates for life, and there was intestacy as to the remainder.

Re Sharon and Stuart, supra, which dealt with another devise in the same will, explained and distinguished.

Per CLUTE, J.:—The previous habendum must be read into the devise now in question in order to give effect to the words "as is aforesaid mentioned;" and not only was the devise to the children of the three sons void (as held by MIDDLETON, J., the trial Judge), but the devise to the wives of the three sons was also void as offending the rules against perpetuities and double possibilities, inasmuch as they were unmarried at the time of the death of the testator, and might not be married until more than 21 years thereafter, and so there would be a devise for life with a further devise which might extend more than 21 years thereafter. Review of the authorities.

Whitby v. Mitchell (1889-90), 42 Ch. D. 494, 44 Ch. D. 85, followed.

Chandler v. Gibson (1901), 2 O.L.R. 442, and *Grant v. Fuller* (1902), 33 S.C.R. 34, explained.

The testator died shortly after making his will, in or about the year 1860, leaving seven children, including the three named, his heirs at law. The three named took possession of the land in question, and, a few years after the testator's death, divided it into three substantially equal portions, fenced the lots and occupied the land, each occupying one portion. Each of the three (or his successor in title) continued to occupy his piece till his death; and the parcels were fenced off as occupied. The plaintiff and the several defendants claimed to be the owners respectively of the three pieces or parts thereof by length of possession or to be otherwise entitled thereto. The last life-tenant, the son J., died in 1912; G. died in 1911; and O. died more than 35 years before the action was brought. The defendant D. was in possession of a strip of land, said to be part of G.'s third, and D. or his predecessor had had possession for many years before the death of O:—

Held, that sec. 7(3) of the Limitations Act, R.S.O. 1914, ch. 75, applied to the case.

Doe dem. Hall v. Mouldsdaie (1847), 16 M. & W. 689, followed.

Sladden v. Smith (1858), 7 U.C.C.P. 74, overruled.

And *held*, by the majority, that, if the strip was part of G.'s third, the defendant D., upon the death of O., became entitled to the life estate of G., in possession, and also to $\frac{1}{4}$ of the fee, to which, on O.'s death, G. became entitled as one of the seven heirs at law of the testator, and remainders amounting to $\frac{2}{4}$ of the fee, in this strip; and thus D. became a tenant in common of the fee; and, having regard to the provisions of sec. 12 of the Act, the result was that, on the death of G., in 1911, since the outside limit of time given under secs. 40 and 41 of the Act had elapsed, D. had acquired the fee in $\frac{1}{4}$ of the strip, directly under sec. 5 and indirectly under sec. 7(3). The death of G. would not give a new term for the statute to begin.

In re Hobbs (1887), 36 Ch. D. 553, followed.

Hill v. Ashbridge (1892), 20 A.R. 44, distinguished.

Any division by the three sons could not be assumed to last beyond their joint lives, since, on the death of any one, other persons became interested in possession as tenants in common of an undivided third interest in all the land, and no arrangement by these sons, *inter se*, could bind the others.

If the strip should be considered not a part of G.'s third, the same result would follow *à fortiori*. The three sons were tenants in common each for life or *pur autre vie* as might turn out. D. acquired whatever estate they had in possession, and, by virtue of sec. 7(3), also their remainders in fee. Then, as all the other heirs at law of the testator became entitled on the death of O. to a share in fee, D., as tenant in common remaining in possession of the whole, became entitled to their shares, both immediate through sec. 5, and through sec. 7(3) in remainder.

Semble, that the life estate, being terminated by the statute, would not be deemed to have determined for all purposes, but to be in effect transferred to the stranger in whose favour time had been running.

Held, also, that the partition made by the three sons of the testator did not create an estoppel against trespassers.

Per CLUTE, J.:—The effect of sec. 7(3) of the Limitations Act, having regard to the decision in *Doe dem. Hall v. Mouldsdaie*, *supra*, was that the defendants D. and C. had, by their possession as to their respective parcels of land, acquired the title thereto as against O., J., and G., and those claiming under them, and in the partition were entitled to $\frac{2}{3}$ of the same respectively. But to bar the other four heirs at law of the testator, who had not a life estate in the lands claimed by D. and C., it would be necessary to assume a new departure for the statute. Section 7(3) had no application to the case of the other heirs. Time would not begin to run against them until the last life estate had fallen

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in. As to them the statute should be strictly construed (*Harris v. Mudie* (1882), 7 A.R. 414, 421); and, so construing it, their interests had not been barred by the possession of D. and C.

The plaintiff asked for a new trial in order that he might give evidence that all the heirs of the testator had consented to a division of the 50 arpents; but this was considered unnecessary, as no evidence in regard to a family settlement could affect the meaning of the will, and evidence of everything else touching the title could be taken in the partition proceedings in the Master's office.

The action as against D. was dismissed, and also as against the defendant C., who was in the same position as to title; but, as against the other defendants, the judgment for partition pronounced by MIDDLETON, J., at the trial, was affirmed; and it was directed that the rights of parties added in the Master's office in the partition proceedings should not be prejudiced by the judgment, and that evidence of everything (*dehors* the will) material to determine the present title to the land should be allowed to be given there.

The Master was also directed to determine what improvements had been made on the property by the plaintiff and defendants under mistake of title, and the amount by which the value of the land was enhanced by the improvements: the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 37.

ACTION for a declaration of the rights of the parties, in regard to a parcel of land; for partition thereof; for possession against persons wrongly in possession; and for general relief.

March 28. The action was tried by MIDDLETON, J., without a jury, at Sandwich.

J. H. Rodd, for the plaintiff.

A. R. Bartlet, for the defendants Taylor.

F. D. Davis, for the defendants Strong, Chevalier, and the Dubys.

April 6. MIDDLETON, J.:—The late Pierre Charron, as he appears to have written his name, was admittedly the owner of the entire parcel designated on the plan as lot A, bounded by Tecumseh road, the concession road, the extension of Broadway, and Eleventh street. This contained about 100 acres.

By his will, dated the 21st October, 1860, Charron attempted to dispose of the land in question. This will has been already the subject of litigation, and is set forth in the report of *Re Sharon and Stuart* (1906), 12 O.L.R. 605, where an application was made under the Vendors and Purchasers Act, and Sir Glenholme Falconbridge, C.J.K.B., interpreted the will in such a way as to indicate that a good title could not be made to the portion now owned by Stuart.

On the hearing of this case, all parties agreed to accept the facts as stated in that report, and supplemented the facts there stated by fresh evidence and admissions.

By the will, clause "secondly," the testator gave "to my three sons, Gilbert, Olivier, and Joseph, the south part of lot lettered 'A' . . . containing 50 arpents" (not acres as stated in the report) "to have and to hold to them as is aforesaid mentioned." By another clause, also numbered "secondly," the testator directs that the "land covered with water running through lot lettered 'A' aforesaid, that is, the marshy land, be used in common by all my sons for the purpose of hunting, fishing, or keeping swine or cattle."

Shortly after the death of Charron, the sons by common consent set apart three portions of the easterly end of lot lettered A. These contain, together, almost the 50 arpents. Gilbert took the easterly portion, and it is admitted that Stuart has acquired the interest of all the children of Gilbert in the 50 arpents. If this partition stands, then Stuart will be entitled to retain the portion of land of which he is in possession. In the same way it is admitted that Strong has acquired the interest of all the children of Olivier, who took the most westerly of the three portions. Joseph took the central portion, and his interest has been conveyed to Mrs. Taylor (a defendant), but she has not acquired the interest of Joseph's only child.

The sons, it appears, assumed that the whole of the westerly portion of the land passed to them as tenants in common, and this, containing about 60 acres, was subdivided into fifths—Chevalier, who lives on the portion between the 50 arpents and the creek, having acquired two one-fifth interests, thus giving him the 24 or 25 acres remaining on that side of the stream after setting off the 50 arpents. Those claiming under the other three sons have taken similar shares in the land west of the stream.

It was agreed by all that the 50 arpents should be taken from the east end of the lot in question, so as not to interfere with the partition which has heretofore been made, particularly that dealing with the land to the west.

It is contended that the testator used the words "arpents" and "acres" interchangeably, and that 50 acres should be meas-

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ured from the east end of the lot, instead of 50 arpents; the difference being between 7 and 8 acres. I do not think this is so, and I think the line shewn as the 50-arpents line upon the plan put in is the governing line.

The first real difficulty arises upon a clause of the will which I have not referred to, which, the Chief Justice held, interprets the words "to hold to them as aforesaid" found in the gifts to the sons. The testator had previously given to each son other parcels of land, following the gift by this provision: "To have and to hold to each of them for and during their natural life respectively, and if they should marry, after their and such of their decease to have and to hold to their surviving wife respectively, and on the demise of their or each of their wives to have and to hold to their children respectively and their heirs forever."

The question raised before the learned Chief Justice was the applicability of this clause to the devise of the shares in the 50 arpents, and as to the effect of the clause. The learned Chief Justice held that each son took an estate for life, his widow, if he left one, an estate for life after his death, and his children the remainder in fee after her death, or, if no widow was left, then in fee after the death of the life-tenant. He negatived the contention that the case was governed either by Wild's case or Shelley's case. The result was simply a declaration that the vendor could not make a good title.

Upon the argument before me the effect of the devise was attacked upon a totally different ground. It is said that the gift to the children is void for remoteness. Manifestly the wife of the son then unmarried might be a person not born at the time of the testator's death; so that the gift to the children is a contingent remainder dependent upon the life estate of a person not yet born. It is true that these children are also the children of the son, who was of course *in esse* at the time of the death; and at first I was inclined to think that this might make a difference. I do not think that the true principle applicable is really so much remoteness as the fact that the estate given to the children is a contingent remainder preceded by an estate

which is also a contingent remainder. There cannot be a contingent remainder upon a contingent remainder.

The latest case upon this is a judgment of Mr. Justice Eve in *In re Park's Settlement*, [1914] W.N. 103, where he held that under a settlement by which property was settled upon a bachelor for life, after his death to his widow, on the death of the widow to his issue, the rule applied and rendered void the gift to the issue: stating the point thus: "As the limitations were to the use of John Foran's widow for life with remainder to issue who might be born of her as his wife, and John Foran being a bachelor at the time of the deed, that wife might be a person not born at the date of the deed, and there was a 'double contingency' and a limitation which offended against what was called the rule against 'double possibilities.' "

In *In re Nash*, [1910] 1 Ch. 1, Mr. Justice Farwell puts the matter, in a way, more simply. According to the rule against perpetuities, all estates and interests must vest indefeasibly within a life in being and 21 years thereafter.

At the time of Pierre Charron's death, the wife of the son, as already pointed out, might not have been born. She might well outlive the son 21 years. So that it is plain that the interests of the children, whether regarded as the children of the father or mother, might not vest within the time limited.

This being so, upon the death of the sons and their wives—which has now happened—the estate in this 50 arpents is not dealt with by the will; and, as there was an intestacy as to this remainder, it passed to the heirs at law of Pierre Charron, that is, to those who were his heirs at his death.

According to the statement in the report, there were 10 children, and they took share and share alike. Some of these have died, and they probably left no issue, so that the number of shares will be somewhat reduced. The three defendants claiming under the sons have acquired, not merely the estate of the son under the devise of the will, but also the estate of the son in the residue of the estate which at the date of the conveyance any of these sons had acquired owing to the intestacy of any of the brothers and sisters then dead or otherwise.

The three defendants in possession of the lands have, no

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doubt, made improvements under a mistake of title; and I think the case is one in which they should be at liberty either to take the portions of the land of which they are in possession, paying its value at the date of the termination of the life-tenancies, or to claim a lien for improvements: the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 37. I would trust that, the rights having been ascertained, the parties may come to some fair arrangement preventing further litigation. If no arrangement can be made, there must be a partition, leaving the Master to deal with the details.

So far I have not dealt with the question raised concerning the rights of the defendant Duby. Duby purchased the lands immediately south of the property in question. Lot 1 undoubtedly ran, according to the earlier plans, as far south as the centre line of Broadway street. There was some intention to extend Broadway, taking one-half of the extension from the land in question and one-half from the land to the south. Possession was taken, and has been held for a long time; but, as this was after Charron's death, the right of his heirs and those claiming under them, which only arose upon the death of the last surviving life-tenant, would not be defeated, the statutory time not having run since that death.

The judgment will, therefore, be for partition of the 50 arpents in question, with a reference to the Master, who will deal with all questions arising out of the right of the present occupant to a lien for improvements or otherwise. The costs will come out of the estate, save that as to the defendants Duby there will be no costs. The judgment will declare that they have not acquired possessory title to the strip of land in question.

There were three appeals from the judgment of MIDDLETON, J.: by the plaintiff; by the defendant Emily V. Sharon; and by the defendants Strong, Chevalier, and the Dubys.

October 21. The appeals were heard by MULOCK, C.J.Ex., HODGINS, J.A., and CLUTE and RIDDELL, JJ.

F. D. Davis, for the appellants the Dubys and Chevalier, argued that, upon the construction of the will given in *Re*

Sharon and Stuart, 12 O.L.R. 605, there was an intestacy after the sons' life estates; the sons had a life estate; there was an undisposed of remainder; and, therefore, the Statute of Limitations ran. The three sons made a partition, by which they are bound. The Dubys were in possession for ten years against the life tenant, and then for a further ten years against the estates in remainder. The plaintiff, the transferee of Gilbert Sharon, is estopped from disputing the claim of Chevalier, who had a deed from Gilbert; for an ancient boundary, which they had amongst themselves agreed upon, cannot be disturbed.

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M. Sheppard, for the appellant Strong, contended that, when a squatter remained ten years, he took the life estate only, after which it passed to the original remainderman. As a matter of law, there is a good remainder in fee to the grandchildren of the testator.

J. H. Rodd, for the plaintiff, appellant, argued that the preceding devise did in fact give a remainder to the children. There is no rule in law which establishes the fact that there can be no contingency upon a contingency: Williams on the Law of Real Property, 21st ed., pp. 365-367, 405, 406; Preston on Abstracts of Title, vol. 1, p. 128; *In re Nash*, [1910] 1 Ch. 1, at pp. 8-10. Our estate is not determinable upon the termination of the estate of the widows, except in so far as they survive their husbands. So, if the wife dies before the husband, his estate becomes vested, and the particular estate is the life estate of the father. *In re Park's Settlement*, [1914] 1 Ch. 595, must be distinguished, as it conflicts with *In re Nash, supra*.

A. B. Drake, for the appellant Sharon, adopted the argument advanced by counsel for the plaintiff, and referred to *In re Nash, supra*.

A. R. Bartlet, for the defendants Taylor, referred shortly to the facts, and relied upon the judgment given at the trial.

Davis, in reply, on the question of perpetuities, referred to *Whitby v. Mitchell* (1889), 42 Ch.D. 494; *In re Frost* (1889), 43 Ch.D. 246; *In re Nash, supra*, distinguishing it; sec. 7 (3) of the Limitations Act, R.S.O. 1914, ch. 75.

December 29. RIDDELL, J.:—Three appeals, heard together, from the judgment of Mr. Justice Middleton. The facts, speak-

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ing generally, sufficiently appear from the judgment, which will be supplemented where necessary.

The statement of claim sets out the will of Pierre Charron, by which, it is alleged, he devised the land in question to his three sons, Gilbert, Olivier, and Joseph for life, with remainder, if they should marry, to their surviving wives, and on the death of the wives to their children; that Olivier died many years ago, leaving a wife and two children, and the defendant Strong acquired all the interest of the widow and children; that Joseph died recently, leaving the defendant Emily V. Sharon his only heir at law, but having in his lifetime conveyed his interest to the defendant Henry Taylor, who conveyed to the defendant Sarah Taylor; that Gilbert, the third son, died recently, leaving ten children, his wife predeceasing him; and that the plaintiff has acquired all the interest of Gilbert and his ten children. The plaintiff claims that he, Strong, and either Emily V. Sharon, Henry Taylor, or Sarah Taylor, are entitled each to an undivided one-third of the land. Then he says that the defendant Chevalier is in possession of the easterly part of the property, but has no interest, as his claim is based upon a purchase from persons who had been in possession of the property for over twenty years; that the south 33 feet of the property is now in the occupation of Louis Duby and Elizabeth Duby, claiming to be entitled under the will of their deceased father and husband; that, shortly after the death of Pierre Charron, his three sons divided the property between them, Olivier taking the easterly, Joseph the centre, and Gilbert the westerly part. Strong has been and is in possession of the easterly, Henry and Sarah Taylor of the centre, and the plaintiff of the westerly part. Then there is another allegation as to fishing and hunting grounds that does not become material.

The plaintiff asked a declaration of the rights of all parties in the said property; a partition; possession against those wrongly in possession; and general relief.

Henry and Sarah Taylor in their statement of defence, after a general denial, set out the will, the division by lot and between the brothers, and the acquisition of Joseph's title.

Strong pleads purchase for valuable consideration, and pos-

session for over twenty years; the division by the devisees; and claims that the plaintiff is estopped from any claim inconsistent with this family settlement, and that he is also estopped by laches.

Chevalier says that he bought the land at a tax sale, and received a deed on the 18th December, 1894; that he has been in possession for ten years; alleges the family division of the land, and the same ground of estoppel as Strong.

Louis Duby and Elizabeth Duby, son and mother, claim by possession, and set up the same estoppel.

Emily V. Sharon says that she is the sole heir at law of Joseph, and that she is the absolute owner in fee simple of an undivided one-third interest in the land.

At the trial the following judgment was given by the learned trial Judge:—

1. This Court doth declare that Gilbert Sharon, Oliver Sharon, and Joseph Sharon, three sons of the late Pierre Charon, became entitled, under the will of said deceased, only to a life interest in the south part of lot lettered "A" on Lake St. Clair, in the township of Rochester, in the county of Essex, containing 50 arpents; and that, after the determination of the remainder to the surviving wives of the said three sons, the estate in the said lands was not dealt with by the said will, and that there was an intestacy with respect thereto, and that the remainder passed to such heirs at law of the said deceased as were heirs at law at the time of his death, and doth order and adjudge the same accordingly.

2. And it is ordered and adjudged that all necessary inquiries be made, accounts taken, costs taxed, and proceedings had for the partition or sale of the said lands and premises, and for the adjustment of the rights of all parties interested therein, or for a partition, or a partition of part and sale of the remainder of the said lands, as may be most for the interest of the parties entitled to share thereof, and that it be referred to the Local Master at Windsor for such purpose.

3. And it is further ordered and adjudged that the said lands, or such part thereof as may be sold, shall be sold with the approbation of the said Local Master, and that the purchasers

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do pay their purchase-moneys into Court to the credit of this action, subject to the order of this Court.

4. And it is further ordered and adjudged that, in the event of a partition of the whole of the said land, or in the event of a partition of a part and the proceeds of the sale of the remainder not being sufficient to pay the costs of the parties to the said action as hereinafter provided, and of this reference, in full, the costs, or so much thereof as remain unpaid, be borne and paid by the parties entitled to the said lands according to their shares and interests in the said lands, and shall be a charge upon such respective interests.

5. And it is further ordered and adjudged that the costs of the parties to this action, other than the defendants Elizabeth Duby and Louis Duby, as to whom there will be no costs, shall be paid out of the estate as above provided, and doth order and adjudge the same accordingly.

6. And this Court doth further declare that the defendants Elizabeth Duby and Louis Duby have not acquired title to any part of the said lands, and that the parties interested therein as hereinbefore provided are entitled to possession thereof as against them.

7. And this Court doth further order and adjudge that, upon the reference hereinbefore directed, the Local Master do determine what improvements, if any, have been made by the plaintiff and the defendants in possession under mistake of title, and fix the value thereof, and the plaintiff and defendants in possession shall be entitled to a lien upon the said lands to the extent of the amount so found.

The main ground of the appeals is as to the effect of the devise of the land in question. The will is printed in 12 O.L.R. at pp. 606, 607, 608, the clause in controversy being as follows: "I give, devise, and bequeath to my son Narcisse Charron the east half of lot number 5 on Lake St. Clair, township of Rochester, containing 50 acres more or less, and to my son Pierre Charron the west half of lot number 5 aforesaid, containing also 50 acres, and to my son Joseph Charron the west half of lot number 8 also on Lake St. Clair in said township of Rochester, and to my son Olivier the east half of the said lot number

8 in said township, containing also 50 acres. To have and to hold to each of them for and during their natural life respectively, and if they should marry, after their and such of their decease to have and to hold to their surviving wife respectively, and on the demise of their or each of their wives to have and to hold to their children respectively and their heirs forever, and I give, devise, and bequeath to my three sons, Gilbert, Olivier, and Joseph, the south part of lot lettered 'A' also on Lake St. Clair in said township of Rochester, containing 50 arpents, to have and to hold to them as is aforesaid mentioned, provided that they pay out of their share of money or otherwise to my executors hereinafter named the sum of \$500, to be disposed of by my said executors in paying my debts and other bequests, and I give, devise, and bequeath to my son Gilbert Charron the north part of the aforesaid lot lettered 'A,' containing also fifty acres, in said township of Rochester, to have and to hold to him, etc., as aforesaid and not otherwise."

The land in question is, in the devise to the three sons, "the south part of lot lettered 'A' . . . containing 50 arpents, to have and to hold to them as is aforesaid mentioned, provided" The learned trial Judge seems to have interpreted the words "as is aforesaid mentioned" as importing into this devise a devise to the wives and children of the three named sons, and held that the limitation could not stand in law. I do not agree as to the effect of the words "as is aforesaid mentioned;" it is "to hold *to them* as is aforesaid mentioned," not to hold to their surviving wives respectively, or to have and to hold to their children. These limitations are all mentioned in the preceding devise; but in this they are not. What is "aforesaid mentioned" as to having and holding "*to them*" is, "to have and to hold to each of them for and during their natural life respectively;" and the whole clause now under consideration, and every word of it, can be given full effect by holding that these are the limitations meant. After the life estates there is an intestacy, as the will makes no provision beyond these life estates. The interpretation contended for would compel us to leave out "to them" or to import other words, either of which courses is wholly inadmissible.

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We were pressed with the judgment of the Chief Justice of the King's Bench in *Re Sharon and Stuart*, 12 O.L.R. 605. That decision was on the last devise, and the limitation was "to have and to hold to him, etc., as aforesaid and not otherwise." I have seen the Chief Justice, and he informs me that the point was not argued, but it was taken for granted by both vendor and purchaser, that the "etc." introduced the limitation of the first devise. It is of course unnecessary to express any opinion on that point; but, the language of the various clauses in this paragraph of the will being carefully examined, it will be seen that each of these two clauses helps in the interpretation of the other. There are three devises in this paragraph. The first has full limitations to sons for life, remainder to surviving wives for life, remainder to children. The second "to them as is aforesaid mentioned." The third "to him, etc., as aforesaid and not otherwise." The "etc." must be given full effect, it being a cardinal rule in the interpretation of wills to give full force to every part as far as possible. The "etc." not being found in the second devise, the limitations of the third must be in excess of those in the second; the limitations in the second not being expressly beyond the persons named, those in the third must be beyond "him" named. The only limitations beyond the persons named which can be described as "as aforesaid" are those in the first devise. It would seem, therefore, that the interpretation in 12 O.L.R. is perfectly right. But in our devise there is no "etc."—this devise has no limitation carried beyond its express words by an "etc."—it must have less limitations than the third, and the only reasonable interpretation is to abide by the express words. This interpretation is strengthened by the proviso imposing upon the named devisees the burden of paying the sum of \$500 "out of their share of money." We in no way attack the credit of the decision of the learned Chief Justice, but the contrary, so far as it affects this case, when we say that the present devise goes no further than its express words carry it. There is consequently no necessity for a new trial on the ground that all parties relied upon that decision.

The declaration in the judgment appealed from, that there

is an intestacy after the life estates of the wives, should be varied by declaring an intestacy after the life estates of the sons.

The plaintiff appeals, asking for an order that the lands in question should be divided among the heirs of Gilbert, Olivier, and Joseph, and not the heirs of Pierre (by a misprint he is called "Gilbert" in the notice of appeal), or for a new trial to bring in evidence of a family arrangement by the heirs of Pierre.

Emily V. Sharon makes the same appeal on much the same grounds.

Strong, Chevalier, and the Dubys appeal, and ask that the action be dismissed as against them.

We must now set out the facts so far as they seem to be material. Some of these we have by admission of counsel, and some from the evidence.

Pierre Charron (or Sharon) died shortly after making his said will, leaving seven heirs at law: Nelson (or Narcisse), Olivier (or Oliver), Gilbert, Joseph, Amelia, Peter, and Emery (or Henry). The date of the death is given by implication, in the evidence of Dennis Renaud, a nephew by marriage. Pierre died when Renaud was seventeen or eighteen, and Renaud is now seventy-two. The death must therefore have been about 1860, and that date is given at the trial by counsel for the plaintiff.

The three sons, Gilbert, Olivier, and Joseph, took possession of parcel "A," and a few years after the father's death, say eight or ten, they divided it into three substantially equal portions, fenced the lots and occupied the land, each occupying one portion. It is not made precisely to appear when or how the arrangement was arrived at; but they drew lots for the portion each was to have, and each of the three (or his successor in title) continued to occupy his piece; and the parcels were fenced off as occupied.

Duby and his predecessors in title have been in possession of his strip for about 50 years, and it is not disputed that the occupation was such as would give a title by the statute.

Olivier died between 35 and 40 years ago, leaving a widow, who is now believed to be dead. She married one Israel Markham, and, with her son, Frederick Henry Charron, and her hus-

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band, in 1884 conveyed the south part of parcel "A" to Firman Lappan. Other heirs at law of Olivier conveyed their interests to Lappan in 1886 and 1887. Lappan conveyed to Dieudonné Lagacé in 1889, and Lagacé to the defendant Strong in 1898, the possession in each case following the title ostensibly conveyed by the deed; so that Strong has now any title Olivier and his wife and heirs at law could convey in "the easterly third of the 50 arpents of said lot 'A,' " as the deed put it.

Gilbert Charron died in 1911, his wife having predeceased him some 5 years. The plaintiff Stuart has a deed from the grantee of his representatives of the east $16\frac{3}{4}$ arpents of the south part of parcel "A;" and he is in possession of this lot. (The deeds are not quite alike, but that is for the Master to investigate as critically as is found necessary.)

Joseph died on the 4th September, 1912 (his wife having died in 1905); he left only one child, a daughter, the defendant Emily V. Sharon. In 1866 he had (with his wife) conveyed all his right in lot "A" to G.C.G.; and G.C.G., in the same year, conveyed to Rose Taylor, through whom the defendants Taylor claim.

The position of the defendant Chevalier is rather different. He has a deed, but it is not of this property or any part of it, and it does not assist in any way to determine rights here in question. His predecessor in title and himself have been in possession of the part claimed by him and adjoining Gilbert's lot from before the time of the amicable division by the three sons of Pierre Charron.

As to the main ground of one appeal, the result will depend wholly on the language of the testator.

With these facts, we proceed to the other appeals; we should, of course, look to the formal judgment to see what we have to dispose of; it is not the reasons of the judgment, but the judgment itself, with which we have any immediate concern.

Clause 1 deals with the declaration of title already spoken of; clauses 2, 3, and 4 direct a partition following on the declaration, and are unobjectionable; clause 5 is as to costs, and stands in the same category, with one exception to be mentioned later; clause 6 declares that the defendants Duby have

not acquired title to any part of the lands, and the Duby appeal must now be dealt with.

The trial Judge proceeded on the ground that the Statute of Limitations did not begin to run against the heirs of Pierre Charron till the death of the last surviving life-tenant. The last life-tenant, i.e., Joseph, died in 1912, and of course possession since that time was insufficient. It is claimed for Duby that he, who or whose predecessor had undoubtedly for many years before the death of the life-tenants had possession of the strip of land, can thereby hold it as against the heirs of Pierre Charron.

It is plain that, if he has any interest in the strip occupied by him, his appeal must succeed. To succeed so far as to obtain a dismissal of the action for partition, he must prove exclusive ownership.

The strip of land in his possession is said to be a part of Gilbert's third. If so, before the death of Olivier the life estate of Gilbert in this strip had become barred by the statute; and as, during the period, Gilbert had been the owner of three remainders, viz., $1/7$ th of $1/3$ rd= $1/21$ st, on the death of each of his two brothers and on his own, these also would be barred.

Section 7 (3) of the Limitations Act, R.S.O. 1914, ch. 75, provides: "Where the right of any person . . . to bring an action to recover any land . . . to which he has been entitled . . . has been barred by the determination of the period . . . applicable in such case, and such person has, at any time during such period, been entitled to any other estate . . . in reversion, remainder or otherwise, in or to the same land . . . no . . . action shall be . . . brought by such person . . . to recover such land . . . in respect of such other estate . . ." (with an exception not applicable here).

There is a singular case in our own Courts which apparently decides that not this section but sec. 6 (12) applies in such a state of facts as exist in this case. In *Sladden v. Smith* (1858), 7 U.C.C.P. 74, Sarah Long, the life-tenant, and David Long, the tenant in fee in remainder, joined (1827) in a conveyance to James Long, through whom the plaintiff claimed. The defendant claimed to have been in possession since 1832, and claimed the bar of the statute. Sarah had died a few months before

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action brought, and the Court (Draper, C.J., Richards, J., afterwards, C.J.C., and Hagarty, J., afterwards C.J.O.) held that the statute did not begin to run until the death of the life-tenant, Sarah. The judgment proceeded solely on the ground that there was no merger, as had been urged by the defendant; and neither by counsel nor by Court was the section in the statute corresponding to our present R.S.O. 1914, ch. 75, sec. 7 (3), referred to. The Act then in force was 4 Wm. IV. ch. 1, in which sec. 31 is substantially the same as sec. 7 (3) of the existing revision. It became successively C.S.U.C. ch. 88, sec. 48; R.S.O. 1877, ch. 108, sec. 6 (3); R.S.O. 1887, ch. 111, sec. 6 (3); R.S.O. 1897, ch. 133, sec. 6 (3); 10 Edw. VII. ch. 34, sec. 7 (3); and now R.S.O. 1914, ch. 75, sec. 7 (3). The Court said: "If then the life estate of Sarah Long was not merged, it remained outstanding, and the statute could not run against the remainderman until her death;" and applied sec. 17 *ad fin.* of the statute of 4 Wm. IV., corresponding to sec. 6 (12) of the present Act.

In *Doe dem. Hall v. Mouldsdale* (1847), 16 M. & W. 689, L.J. had acquired, as heir of A. J., by reason of certain limitations in the will of A. J., a life estate for three lives, and also remainder in fee simple, which he had by the will of R. J., who had bought it. A trespasser went into possession on the death of R. J. in 1812, and remained in possession. The lease for lives terminated in 1835, and R. J. brought his action within the statutory period thereafter. The Court (Parke, Alderson, Rolfe, and Platt, BB.) held that, since "L. J. had two separate estates or interests, one in the term as heir of A. J., and another in the reversion as heir of R. J., still he and those claiming under him were barred by the Statute of Limitations, 3 & 4 Wm. IV. ch. 27"—corresponding to our statute: The Court declined to consider the question of merger, as being unnecessary. The head-note of this case reads: "That branch of the third section of the Limitation Act, 3 & 4 Wm. IV. ch. 27" (3 & 4 Wm. IV. ch. 27, sec. 3 *ad fin.*, corresponding to R.S.O. 1914, ch. 75, sec. 6 (12)) "which relates to estates in reversion, expectant on the determination of a particular estate, applies only to cases where

another person than the reversioner is entitled to the particular estate."

I do not find this case questioned in England, though such cases as *Ludbrook v. Ludbrook*, [1901] 2 K.B. 96, shew its limits.

In Ireland, *Clarke v. Clarke* (1868), 2 Ir. Rep. C.L. 395, lays down the same doctrine in substance. A testator left certain land to A., and in either of two stated events the land was to go to B. The first of the two events occurred, but A. stayed in possession for more than twenty years, when the second event—i.e., the death of A. without a lawful heir—happend. A few months thereafter, B. brought his action against the devisee of A. It was held that B., being barred in respect of the estate to which he was entitled on the happening of the first event, was also barred of the possibility depending on the death of A. without lawful heir.

Sugden on Vendors and Purchasers, 14th ed., p. 480, lays it down thus: "The provision in sec. 5" (of the Imperial Act) "applies to those cases only where another person than the owner of the particular estate is the reversioner." Dart on Vendors and Purchasers, 7th ed., p. 452, Armour on Real Property, p. 458, Lightwood's Time Limit on Actions, pp. 59 *sqq.*, Lightwood's Possession of Land, p. 213, all agree with this statement.

In the case in 7 U.C.C.P. the statute was not cited or discussed, and the English case in 16 M. & W. was not brought to the attention of the Court. Had it been, the Upper Canada Court would of course have followed the English case (*Trimble v. Hill* (1879), 5 App. Cas. 342), the statutes being practically identical in their language.

We should therefore hold that *Sladden v. Smith* is not well decided, and that sec. 7 (3) applies to the present case.

Unless more appears, the death of Olivier saw Duby entitled to the life estate of Gilbert in possession, the $\frac{1}{4}$ of the fee, to which, on Olivier's death, he (Gilbert) became entitled in possession, and remainders amounting to $\frac{3}{4}$ of the fee, in this strip. Of course any division by the three sons of Pierre could not be assumed to last beyond their joint lives, since, on the death of any one, other persons became interested in possession

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as tenants in common of an undivided third interest in all the land, and no arrangement by these sons, *inter se*, could bind them.

Then Duby became a tenant in common of the fee; he held possession of the whole land without accounting to any one.

Section 12 provides that "where any one . . . of several persons entitled to any land . . . as . . . tenants in common has . . . been in possession . . . of the entirety . . . of such land . . . for his . . . own benefit . . . such possession . . . shall not be deemed to have been the possession . . . of . . . the person or persons entitled to the other share or shares . . . or any of them." The result would be that, on the death of Gilbert in 1911, since the outside limit of time given under secs. 40 and 41 of the Act had elapsed, Duby would have acquired the fee in one-third of the lot, directly under sec. 5 and indirectly under sec. 7 (3). The death of Gilbert would not give a new term for the statute to begin.

Hill v. Ashbridge (1892), 20 A.R. 44, decides that, where there are several tenants in common in land, of whom all but one are in possession, and before the ten years have run the latter acquires another undivided share from or under one of those in possession, the Statute of Limitations runs as to both shares from the time the last one was acquired. But that case turns on the acquisition before the expiration of ten years, as is pointed out by Mr. Justice Maclellan, distinguishing *In re Hobbs* (1887), 36 Ch. D. 553. This last case is authority for the proposition I have just laid down.

If the strip be considered not a part of Gilbert's third, the same result will follow *à fortiori*. The three sons of Pierre were tenants in common each for life or *pur autre vie* as might turn out. The trespasser acquired whatever estate they had in possession, and, by virtue of sec. 7 (3), also their remainders in fee. Then, as all the other heirs at law of Pierre became entitled on the death of Olivier to a share in fee, the trespasser, as tenant in common remaining in possession of the whole, became entitled to their shares, both immediate through sec. 5, and through sec. 7 (3) in remainder.

It is not necessary in this case to decide whether, the life estate of the one or the three sons, as the case may be, being terminated by the statute, at once the remainder began. I am not to be taken as assenting to that doctrine, and think the view of Lightwood, *Possession of Land*, 1894, p. 213, is preferable to the suggestion of Mr. Armour, "On Titles," 3rd ed., p. 146. Lightwood says: "Probably it" (i.e., the life estate) "would not be deemed to have determined for all purposes, but to be in effect transferred to the stranger in whose favour time has been running." If *Sladden v. Smith* was well decided, this case would probably be full of difficulty, but that inquiry need not be pursued.

On this evidence and on this record, Duby should have a judgment dismissing this action as against him; and that is all he asks now. The judgment should be varied accordingly, and Duby have his costs here and below.

This, however, should not be considered final in all respects. Some of the facts we have from statements of counsel, and some are not wholly clear except with the admissions of counsel. So, while all parties interested will probably be willing to leave Duby's strip out of the partition proceedings, any one not a party to this record should, if he alleges the facts as being different from what appears above, be allowed by the Master, at his own peril as to costs, to bring him into the partition proceedings.

Chevalier is in the same position as to title, but not as to the judgment. No judgment is pronounced against him, but he can and does ask that the action should be dismissed as against him. I think the same order should be made in his case as in Duby's.

These two argue that the partition made by the three sons of Pierre Charron should be declared binding on all parties. The argument that such act created an estoppel as against these trespassers savours of absurdity. The essence of an estoppel *in pais* is an act or word done or said with the intent that it should be acted upon by him claiming the benefit of an estoppel, and it will scarcely be contended that these three brothers divided up their lands so that some one should trespass on them.

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I do not think it matters to these defendants whether the representatives of these three were bound by their partition; but, in any event, as has been said, it could not last beyond the life-tenancies.

Strong stands in quite a different position. He has all that Gilbert and his children could give him. He is rightly a party to the partition; and whether there can be anything in the way of an estoppel will be threshed out in the Master's office, when all the facts are known. The case cannot be dismissed as against him, the only declaration made being as to the effect of the will at the time of the death of Pierre. Evidence can be taken by the Master on anything shewing or tending to shew any transaction (*dehors* the will), estoppel, descent, conveyance and everything material to determine the present title to the land.

Taylor is the assignee of Joseph Sharon, and is in the same position, and his appeal should be dismissed also. He, too, will have a chance to shew in the Master's office any right, claim, or title he may have.

Emily A. Sharon can have nothing to complain of so far as the judgment is concerned. She claims a share in the estate under the will; the claim that she is a devisee in remainder under the will cannot be given effect to, but she is an heir of Pierre Charron, and will be heard in the Master's office. Her appeal should be dismissed.

For the plaintiff's appeal the reasons are adduced, viz., that all parties relied upon the interpretation of the will in 12 O.L.R., and they now desire to give evidence that all the heirs of Gilbert (*sic*), i.e., Pierre Charron, deceased, consented to a division of the estate. This is quite unnecessary. It has already been pointed out that evidence of everything *dehors* the will can be effectively taken, and should be taken, in the Master's office in the partition proceedings. No evidence as to family settlement, etc., can affect the meaning of the will itself.

While Duby and Chevalier should have their costs here and below paid by the plaintiff, who brought them in, there should otherwise be no costs.

Many curious and perplexing questions will probably arise on the reference, but they need not be here referred to.

The last clause in the judgment directing the Master to determine what improvements have been made on the property by the plaintiff and defendants, and the value thereof, is, of course, conditional on any such having made improvements under mistake of title, and the inquiry will not be as to the value of the improvements but as to "the amount by which the value of the land is enhanced by the improvements," quite a different thing: the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 37.

In settling judgments, etc., "officers of the Court should endeavour to use the language of the statute, and not employ terminology which may seem to them to be equivalent:" *Re Coulter* (1907), 10 O.W.R. 342, 344.

MULOCK, C.J.Ex., and HODGINS, J.A., concurred.

CLUTE, J.:—Three appeals from the judgment of Middleton, J.

On the hearing, all parties agreed to accept the facts as stated in the report of *Re Sharon and Stuart*, 12 O.L.R. 605, as supplemented by further evidence and admissions taken and made in this case. The will of Pierre Charron, there set forth in full, is dated the 21st October, 1860, and the testator died about the 11th December, 1860. The portion of the will which is involved and calls for construction in this case is as follows: "I give, devise, and bequeath to my three sons, Gilbert, Olivier, and Joseph, the south part of lot lettered 'A' also on Lake St. Clair in said township of Rochester, containing 50 arpents, to have and to hold to them as is aforesaid mentioned." The "aforesaid mentioned" refers to a previous part of the clause ("secondly") containing a gift to his sons: "To have and to hold to each of them for and during their natural life respectively, and if they should marry, after their and each of their decease to have and to hold to their surviving wife respectively, and on the demise of their or each of their wives to have and to hold to their children respectively and their heirs forever."

It was held by the learned trial Judge, reading the words of the gift with the preceding *habendum*, which would then

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read, "I give, devise, and bequeath to my three sons, Gilbert, Olivier, and Joseph, the south part of lot lettered 'A' also on Lake St. Clair in said township of Rochester, containing 50 arpents, to have and to hold to each of them for and during their natural life respectively, and if they should marry, after their and each of their decease to have and to hold to their surviving wife respectively, and on the demise of their or each of their wives to have and to hold to their children respectively and their heirs forever," that the gift was in fact a contingent remainder preceded by an estate which is also a contingent remainder, and that, as there cannot be a contingent remainder upon a contingent remainder, the estate in these 50 arpents is not dealt with by the will; and, as there was an intestacy as to this remainder, it passed to the heirs at law of Pierre Charron, that is, to those who were his heirs at his death. He refers to *In re Park's Settlement*, [1914] W.N. 103, now reported in [1914] 1 Ch. 595; and to *In re Nash*, [1910] 1 Ch. 1. He says: "Manifestly the wife of the son then unmarried might be a person not born at the time of the testator's death; so that the gift to the children is a contingent remainder dependent upon the life estate of a person not yet born. It is true that these children are also the children of the son, who was of course *in esse* at the time of the death; and at first I was inclined to think that this might make a difference." After stating the conclusion and citing the cases above mentioned, he proceeds: "According to the rule against perpetuities, all estates and interests must vest indefeasibly within a life in being and 21 years thereafter. At the time of Pierre Charron's death, the wife of the son, as already pointed out, might not have been born. She might well outlive the son 21 years. So that it is plain that the interests of the children, whether regarded as children of the father or of the mother, might not vest within the time limited. This being so, upon the death of the sons and their wives—which has now happened—the estate in this 50 arpents is not dealt with by the will; and, as there was an intestacy as to this remainder, it passed to the heirs at law of Pierre Charron, that is, to those who were his heirs at his death."

In considering the will, I am of opinion that the previous

habendum in the gift to the brothers must be read into the devise under consideration in order to give effect to the words "as is aforesaid mentioned."

In *Re Sharon and Stuart*, above referred to, in regard to a subsequent devise to Gilbert of another piece of land, "to have and to hold to him, etc., as aforesaid and not otherwise," it was held that the habendum above quoted must be read into this clause, and that, being so read, Gilbert took an estate for life, and his widow, if he left one, an estate for life after his death, and his children the remainder in fee after her death. As pointed out by my brother Middleton in this case, the question raised before the learned Chief Justice in *Re Sharon and Stuart* was as to the applicability of the previous clause of the devise to Gilbert; but the question now raised as to the remoteness of the gift to the wives of the devisees and to their children was not raised or considered.

In Williams on the Law of Real Property, 21st ed., pp. 405, 406, the question here involved is fully dealt with and the rule as now settled stated. It is pointed out that "the limitation of estates to arise at a future time by way of shifting use or executory devise must conform to the requirements of a rule, known as the rule against perpetuities; or else it will be void for remoteness. . . . In the case of future estates to arise by way of shifting use and executory devise, these due bounds were gradually settled by successive decisions. Such estates were allowed to take effect, at first, within the compass of an existing life; then within a reasonable time after. This reasonable time after an existing life was next extended to the period of the minority of an infant actually entitled under the instrument by which the executory estate was conferred. After this, it was held that any number of existing lives might be taken. Finally, it was settled that the time allowed after the duration of existing lives should be a term of twenty-one years, independently of the minority of any person, whether entitled or not. . . ."

In *In re Park's Settlement*, [1914] 1 Ch. 595, the head-note in part reads: "Limitation of freehold to issue of bachelor in remainder after life estate to widow held void as infringing 'the rule against limiting land to an unborn child for life with

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a remainder to his unborn child.' ” Eve, J., after referring to the decision in *In re Nash*, [1910] 1 Ch. 1, 9-10, as “the rule against limiting land to an unborn child for life with a remainder to his unborn child,” said: “I think, upon the authorities, that this contention is well founded. I cannot read the judgments of Kay, J., in *In re Frost*, 43 Ch. D. 246, and Neville, J., in *Whitting v. Whitting* (1908), 53 Sol. J. 100, without coming to the conclusion that the provisions of this settlement bring it within those decisions. . . .”

In *In re Frost*, the testator devised a freehold estate to the use of his sons and their heirs during the life of his daughter E., upon trusts for such daughter; and after her decease “to the use of any husband whom she may hereafter marry,” during his life; and, after the death of the survivor of his daughter and such husband, to the use of the children of his daughter as she should appoint, etc. The daughter E. was a spinster at the testator’s death, married in 1872, and died shortly afterwards without issue; her husband died in 1888. Held, that the limitations subsequent to the life of the daughter’s husband were void for remoteness, and that on his death the devised estate passed into the residuary gift. Kay, J. (p. 252), refers to *Whitby v. Mitchell*, 42 Ch. D. 494, and says in part (p. 253): “There is the double possibility. There might not be an unborn husband—I mean a husband to Emma Frost unborn at the death of the testator. But if there were, the other contingency which is to take effect upon his death might never happen. There you have a double contingency, or a double possibility as the old lawyers would have said. I confess I think that this limitation would have been held to fall within the same doctrine, and would most probably have been held void, if the ingenuity of lawyers had ever imagined such a limitation. But if it is not void upon that ground it is certainly void as a perpetuity if the rule against perpetuity applies to the case.”

Reference is made to the judgment of Lord St. Leonards in *Cole v. Sewell* (1843), 4 Dr. & War. 1, 28, where language was used which has been read as meaning that the doctrine of remoteness never could apply to a contingent remainder: “But none of that language contemplates the case of there being in-

terposed a possible estate for life to a person not in existence, and a contingent remainder over on the death of that person" (pp. 253, 254).

In *Whitting v. Whitting*, 53 Sol. J. 100, the donees of a power of appointment appointed to their son, an object of the power, for life, and then to any wife of such son, the wife not being an object of the power, for her life. The son was a party to the deed of appointment. It was held that the appointment to the wife was good, as the deed operated as a settlement by the son of the appointed fund. A settlement upon any children attaining twenty-three years of age of the settlor by any wife was held void as infringing the rules against perpetuities and double possibilities.

In *Whitby v. Mitchell*, 42 Ch. D. 494, affirmed (1890) 44 Ch. D. 85, the head-note reads: "The rule applicable to legal limitations, that an estate cannot be limited to an unborn person followed by an estate to any child of such unborn person, is an absolute rule, independent of the rule against perpetuities whereby property cannot be tied up for a longer period than a life or lives in being and twenty-one years afterwards, with the addition of the period of an actually existing gestation."

In appeal, Cotton, L.J., referring to the judgment of Mr. Justice Kay, said (44 Ch. D. at p. 89): "Mr. Justice Kay has decided, and in my opinion rightly, that there is a rule in existence which does prevent the limitation from being good, namely, that you cannot have a possibility upon a possibility; or, to state the rule in a more convenient form, that you cannot have a limitation for the life of an unborn person, with a limitation after his death to his unborn children to take as purchasers. This is the same thing as what has been called 'a possibility upon a possibility.' But it is said that, although there is such a rule in existence, it is suspended by the more modern rule against perpetuities. In my opinion the old rule with regard to a possibility on a possibility has not been done away with by this modern rule. It is conceded that the rule against a possibility upon a possibility existed long before the rule prohibiting the limitations of estates tending to a perpetuity existed. . . . It is clear, in my opinion, that the rule under which Mr. Justice

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Kay has decided this case is a rule which Judges treated as still subsisting long after the rule against perpetuities had been crystallised and laid down in definite and distinct terms." Lindley, L.J., and Lopes, L.J., are to the same effect.

It would appear therefore, as was said by Lopes, L.J., "that these are two independent and co-existing rules. The rule against perpetuities originated and was rendered necessary on account of the introduction of executory devises and springing uses, against which the old rule would have been an insufficient protection."

While I agree with my brother Middleton that the gift to the children was void, it would also appear to follow from *Whitby v. Mitchell* that the gift to the wives of the three sons was also void as offending the rule against perpetuities, inasmuch as they were unmarried at the time of the death of the testator, and might not be married until more than twenty-one years thereafter, and so there would be a gift for life with a further gift which might extend more than twenty-one years thereafter.

In *Chandler v. Gibson* (1901), 2 O.L.R. 442, a will made in 1877 by a testator who died in 1882, contained the following provision: "To my son Moses I give and bequeath fifty acres during his lifetime and then to go to his children, if he has any, but should he have no issue then to be equally divided among all my grandsons." Moses married after his father's death, and left children him surviving at the time of his own death. Held, that Moses took an estate for life with a remainder in fee to the children, and not an estate tail.

In *Grant v. Fuller* (1902), 33 S.C.R. 34, land was devised to D. for life and to her children if any at her death, if no children to testator's son and daughter. D. had no children when the will was made. Held, that the devise to D. was not of an estate in tail, but on her death her children took the fee. The will in this case was dated in 1852, and was recorded in 1857, the testator having died in the meantime. Davies, J., who delivered the judgment of the Court, refers to *Chandler v. Gibson*.

It is difficult, if not impossible, to reconcile *Grant v. Fuller* and *Chandler v. Gibson* with the authorities above quoted. The explanation would appear to be that both cases were argued

and disposed of upon other grounds, and the question as to the application of the rule against double possibilities was not considered.

In *Whitting v. Whitting*, 53 Sol. J. 100, Neville, J., puts the case very clearly. He says: "In my opinion the limitation in the settlement . . . in favour of 'all the children or any child of the said Edward Morgan Whitting by any wife who, being son, shall attain the age of twenty-three,' is void, whether considered with regard to the rule against perpetuities or to the rule against double possibilities. In the one case the estate need not vest within a life or lives in being at the date of the settlement and twenty-one years, and in the other there is a remainder to the unborn child of a wife possibly unborn at the date of the settlement: see *Whitby v. Mitchell*, 44 Ch. D. 85, and *In re Frost*, 43 Ch. D. 246."

Having regard to the fact, as it seems to be, that the question here involved was not raised by counsel in the argument nor considered by the Court in either *Grant v. Fuller* or *Chandler v. Gibson*, I think I am bound to follow the line of English decisions referred to and to hold that the devise to their children respectively and their heirs forever is void. The question as to whether the wives of the sons married after the death of the testator could take a life estate or whether they also would be barred by reason of there being a double possibility (namely, that such person might not be born, and if born might not marry the son), need not here be considered, as the wives are dead. The result is, that there is an intestacy caused after the death of the sons and their wives, and possibly after the death of the sons.

Pierre Charron died about December, 1860, leaving seven heirs at law, namely, Nelson or Narcisse, Oliver, Gilbert, Joseph, Amelia, Peter, and Emery or Henry. After his death, Gilbert, Oliver, and Joseph took possession of parcel "A," the land in question, and divided the property between them, Oliver taking the easterly, Joseph the centre, and Gilbert the westerly portion.

The defendants Elizabeth Duby and Louis Duby have occupied the southerly thirty-three feet for over forty years, and are entitled to the same by possession unless precluded in whole

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or in part by the outstanding life estates of Joseph, Oliver, and Gilbert, which I will consider later.

Oliver died many years ago, leaving a widow and two children, and the interests of the wife and children in the lands in question have since been acquired by the defendant Michael Strong.

Joseph died on the 4th December, 1912, his wife having predeceased him. He left one child, the defendant Emily V. Sharon. In 1866, he conveyed all his right in lot "A," which by mesne conveyances passed to the defendants Taylor.

Gilbert Sharon died in 1911. His representatives conveyed the east $16\frac{2}{3}$ arpents of the south part of lot "A" to the plaintiff, Stuart, who is in possession and claims title as the representative of Gilbert Sharon.

The defendant Albert Chevalier claims by possession, through himself and his predecessors in title, a small portion of land abutting Gilbert's lot, of which he has been in possession for a period prior to the division by the three sons of the testator.

The plaintiff appeals, relying upon the construction placed upon the will by the Court in the case of *Re Sharon and Stuart*, 12 O.L.R. 605, whereby it was held, in regard to the north part of lot lettered "A," not forming a part of the lands in question in this action, that Gilbert took an estate for life, and his widow an estate for life after his death, and his children the remainder in fee after her death. The principal question argued there was, whether the rule in Wild's case applied. The question here involved was not raised or decided. In the plaintiff's appeal he asks for a partition of the lands between the heirs of Gilbert, Oliver, and Joseph, and those claiming under them, or for a new trial for the admission of further evidence. I see no ground for a new trial so far as the plaintiff is concerned; all the facts were known to all the parties as well before the trial as they are now; nor do I see how a new trial could benefit the plaintiff or change the result.

The appeal on behalf of Emily V. Sharon is the same in substance as that of the plaintiff, she being the only child of Joseph, and entitled as one of the heirs at law of the testator. This appeal should be dismissed.

As to the claim of Duby and Chevalier:—

At the time the will was made, the Act respecting the Limitation of Actions relating to Real Property, 4 Wm. IV. ch. 1, was in force as C.S.U.C. ch. 88, sec. 48, and is continued down and now appears as R.S.O. 1914, ch. 75, sec. 7, sub-sec. 3.

The learned trial Judge apparently relied upon sec. 5 of the Act, and held that the statute would not begin to run against the heirs of the testator until after the expiration of the life estates. The effect of sec. 48 of C.S.U.C. ch. 88, now sec. 7, sub-sec. 3, was not drawn to his attention and not considered. In dealing with this section the learned author of *Lightwood's Time Limit on Actions*, 1909 ed., p. 59, deals with this question, and points out that "of the successive estates into which the fee is divided, more than one may belong to the same person, and the owner of the particular estate, against which the time is running, may thus be the owner also of a future estate; where, for example, there is a life estate in A., who has been dispossessed, remainder to B. for life, remainder to A. in fee. In such case sec. 20 of the Act of 1833 (sec. 7, sub-sec. 3, R.S.O. 1914) provides that a bar to the first estate of A. is a bar also to his subsequent estate, unless in the meantime possession of the land has been recovered in respect of B.'s intermediate estate;" and, after quoting the section, the author refers to *Doe dem. Hall v. Mouldsdale*, 16 M. & W. 689.

The clause in question is as follows: "(3) Where the right of any person to make an entry or distress, or to bring an action to recover any land or rent to which he has been entitled for an estate or interest in possession, has been barred by the determination of the period which is applicable in such case, and such person has, at any time during such period, been entitled to any other estate, interest, right or possibility, in reversion, remainder or otherwise, in or to the same land or rent, no entry, distress or action shall be made or brought by such person or by any person claiming through him, to recover such land or rent in respect of such other estate, interest, right or possibility, unless in the meantime such land or rent has been recovered by some person entitled to an estate, interest or right which has

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been limited or taken effect after or in defeasance of such estate or interest in possession."

The effect of this clause, having regard to the decision in *Doe dem. Hall v. Mouldsdale*, is that the defendants Elizabeth Duby and Louis Duby and Albert Chevalier have, by their possession as to their respective parcels of land, acquired the title thereto as against the three brothers, Oliver, Joseph, and Gilbert, and those claiming under them, and in the partition are entitled to three-sevenths of the same respectively, and the judgment below should be varied accordingly.

In *Sladden v. Smith*, 7 U.C.C.P. 74, this section was not relied upon nor referred to by counsel, nor considered in the judgment; neither was *Doe dem. Hall v. Mouldsdale* considered.

If it be said that the Dubys have been in possession a sufficient length of time—over 35 years—to claim title by possession against the other four heirs of the testator (who held no life estate in the portion claimed by the Dubys), because, after Oliver, Gilbert, and Joseph were barred, they became tenants in common with the other heirs, and that sufficient time has since elapsed to bar them also; it is, I think, a sufficient answer to say that, claiming without colour of right and not under a defective title, the statute must be construed strictly as against them: *Harris v. Mudie* (1882), 7 A.R. 414, 421, where the rule is thus stated by Burton, J.A., who pronounced the judgment of the Court: "The rule, as I understand it, has always been to construe the Statutes of Limitations in the very strictest manner where it is shewn that the person invoking their aid is a mere trespasser, having no colour of title, and such a construction commends itself to one's sense of right. They were never in fact intended as a means of acquiring title, or as an encouragement to dishonest people to enter on the land of others with a view to deprive them of it." Reference is made to *Doe dem. Shepherd v. Bayley* (1853), 10 U.C.R. 310; *Doe Beckett v. Nightingale* (1849), 5 U.C.R. 518; and *Edmunds v. Waugh* (1866), L.R. 1 Eq. 418, 421.

To bar the other four reversioners, who had not a life estate in the lands claimed by Duby and Chevalier, it would be necessary to assume a new departure for the statute to begin to run

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after the end of the first period which would bar Oliver, Joseph, and Gilbert. Section 7, sub-sec. 3, of the Act, has no application to the case of the other heirs. They are not affected by any title by possession obtained under it. So far as they are concerned, there is an outstanding life estate, and time would not, I think, begin to run as against them until the last had fallen in. The statute should be strictly construed as to them; and, so construing it, their interests have not been barred by the possession of the defendants the Dubys and Chevalier. It never began to run as to them, they not being within sec. 7 (3).

Michael Strong is entitled to such interest as passed to him by the conveyance from the children and heirs of Oliver. His appeal should be dismissed.

With the variation above indicated, all three appeals should be dismissed; the costs of all parties, including the costs here and below of the defendants the Dubys and Chevalier, should be paid out of the estate.

Judgment below varied.

[APPELLATE DIVISION.]

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Deed—Construction—Building Scheme—Conveyances of Building Lots in Park—"Access to Streets, Avenues, Terraces, and Commons"—Meaning of "Commons"—Unenclosed Spaces on Plan—Absence of Designation—Covenant—Quasi-dedication—Easement—Purchaser for Value without Notice—Evidence.

The judgment of MIDDLETON, J., 30 O.L.R. 289, was affirmed.

At the hearing of the appeal further evidence was (by consent) taken upon the question whether the petitioner was a *bonâ fide* purchaser for value without notice, and that question was determined against him.

And *held*, that, having regard to the building scheme inaugurated when the lots were put upon the market, the covenants in the conveyances to the purchasers giving them rights in respect of what were called "commons" created an obligation on the part of the vendors that this right should not be encroached upon by them or purchasers from them. The word "commons," as used in the deeds, was not intended to have any strict or technical meaning, but to signify certain places in the park which were to be open and free to all for the purpose of general enjoyment and amusement.

Review of the authorities.

Renals v. Cowlishaw (1878-9), 9 Ch.D. 125, 11 Ch.D. 866, and *Spicer v. Martin* (1888), 14 App. Cas. 12, specially referred to.

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APPEAL by Sidney Small, the petitioner, from the judgment of MIDDLETON, J., 30 O.L.R. 289.

September 21 and 22. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

J. Bicknell, K.C., for the appellant. The appellant's rights depend upon the construction of the deed. I submit that under the terms of the deed the purchaser of a lot only got a right to the necessary street fronting the lot. The word "commons" in the deed did not necessarily include the spaces on the plan marked as X, Y, and Z. There is no certainty as to what land was covered by the word: *Chastey v. Ackland*, [1895] 2 Ch. 389; *Stephens v. Gordon* (1892-3), 19 A.R. 176, 22 S.C.R. 61. A grant of a right of common is unknown to the law, and cannot be defined. It is not an easement or restrictive covenant, and it does not run with the land. A right to play is a grant unknown to the law: *Dyce v. Hay* (1852), 1 Macq. H.L. 305; *Attorney-General v. Antrobus*, [1905] 2 Ch. 188, at pp. 198, 199; *Austerberry v. Corporation of Oldham* (1885), 29 Ch. D. 750. Every easement must be to the advantage of the dominant tenement: *Ackroyd v. Smith* (1850), 10 C.B. 164; Gale's Law of Easements, 8th ed., p. 10 *et seq.*; *Keppell v. Bailey* (1834), 2 My. & K. 517, at p. 535; *Kennedy v. Kennedy*, [1914] A.C. 215. The appellant is a *bonâ fide* purchaser for value without notice of any such object as a building scheme on the part of the original promoters: *Whitehouse v. Hugh*, [1906] 1 Ch. 253; *Elliston v. Reacher*, [1908] 2 Ch. 374; *Reid v. Bickerstaff*, [1909] 2 Ch. 305; Halsbury's Laws of England, vol. 25, p. 458; *City of Toronto v. McGill* (1859), 7 Gr. 462; *Barber v. McKay* (1890), 19 O.R. 46.

M. H. Ludwig, K.C., for A. R. Clarke and others, claimants, respondents. It is clear from the deed that "commons" includes the spaces X, Y, and Z. But, if it does not, then extrinsic evidence is admissible to prove it: *Israel v. Leith* (1890), 20 O.R. 361. "Commons" means land adjacent to lots. All the land not ear-marked by the plan for other uses is commons. The word is not used here in its limited, technical sense, but *quâ* picnic grounds, etc. A definition of the word is given in Hals-

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bury's Laws of England, vol. 4, para. 945. Extrinsic evidence may be given to shew what the parties meant by the word: *Macenzie v. Childers* (1889), 43 Ch. D. 265; *Spicer v. Martin* (1888), 14 App. Cas. 12. On the question of the right of access to a common being an easement, I refer to *Wood v. Leadbitter* (1845), 13 M. & W. 838, and *Hurst v. Picture Theatres Limited* (1914), 30 Times L.R. 642. The right to the use of these commons is here an easement: Halsbury's Laws of England, vol. 11, p. 499. If not an easement, it is a covenant: Halsbury's Laws of England, vol. 13, p. 100, foot-note (a). If this right is a license, it is an irrevocable one: Goddard's Law of Easements, 7th ed., pp. 571, 572. By clause 10 of the deed, the vendors reserve the right to do certain things on these commons, and this implies that these are the only reservations, and that the vendors will not otherwise interfere with them. The evidence shews that it was the intention of the company to keep the plots open for the purpose of general enjoyment and amusement: *Bateman v. Bluck* (1852), 18 Q.B. 870; *Davis v. Corporation of Leicester*, [1894] 2 Ch. 208; *Elliston v. Reacher*, [1908] 2 Ch. 374; *Renals v. Cowlishaw* (1878-9), 9 Ch. D. 125, 11 Ch. D. 866.

Bicknell, in reply. This right of access was a mere personal license, which could not contravene the rule against perpetuities.

December 29. CLUTE, J.:—Appeal by the petitioner from the judgment of Middleton, J., pronounced on an appeal by the petitioner and cross-appeal by the claimants, under the Quieting Titles Act, from the report of the Referee of Titles at Toronto.

The principal facts are not in dispute, and are fully set out in the judgment of the learned Referee of Titles and in the judgment of Middleton, J., reported in 30 O.L.R. 289.

The petitioner claims to be the owner in fee simple in possession of certain lots and subdivisions according to a plan of subdivision of Lorne Park filed in the registry office for the county of Peel on the 7th August, 1886, as amended by a subsequent plan of the said park filed on the 9th May, 1888, subject only to the charges or incumbrances in the schedule thereto mentioned.

In answer to the petitioner, Alfred R. Clarke and others, as

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grantees of certain lots in the property known as Lorne Park, claimed to be entitled to free access to all the streets, avenues, terraces, and commons of the said park, and to free ingress and egress for themselves and their respective families, servants, and agents, with horses and carriages or other vehicles, to and from their said lands by any of the streets or avenues in the said park, and to free ingress and egress to and from the said park at any wharf or wharves in front thereof.

It was agreed before the Referee of Titles that the deed from the Toronto and Lorne Park Summer Resort Company to George W. Booth dated the 23rd day of April, 1887, registered as number 6090, should be taken to be the kind of deed whereby all lots which have been sold in Lorne Park have been conveyed.

The Referee found and determined that the claimants were entitled to free access, ingress, and egress to and from all the streets, avenues, and from Boustead Terrace, delineated on the plans of Lorne Park and numbered B. 88 and C. 88, and also to free access, ingress, and egress to and from the said park by any wharf or wharves in front of the said park, and also to free access to two certain blocks of land shewn on the said plan B. 88, bounded by certain streets and marked on the plan at the trial as X and Z, and found and determined the said blocks to be the commons referred to in the deeds made to the purchasers of lots in Lorne Park, and that the right of the petitioner to the lands and premises in question is subject to the rights of the said claimants and of other persons, owners of lots or part of lots in Lorne Park, who are also entitled to the same rights as the claimants. The claimants thus succeeded as to X and Z, and failed in respect to block Y.

Middleton, J., held that the word "commons" in the deed should be taken to include the three blocks mentioned, and that it was the intention of the parties that these three parcels should be set apart and held as recreation grounds for the use of those who might buy lots upon the faith and strength of the scheme put forth by the vendors; that a private right had been conferred upon the individuals who purchased relying upon the scheme propounded by the vendors; that the lots were sold upon what might be called a building scheme by which a portion of

the whole tract was set apart by the vendors for the benefit of the purchasers, and that the vendors cannot depart from the plan or scheme which was the foundation of the sales; that this may be regarded as an implied covenant, an implied grant of an easement, an equity in the nature of an easement, or it may rest on the principles of estoppel. In any case the property so dedicated or quasi-dedicated is rendered subject to the rights held out to the purchaser as an inducement to purchase, and these rights may exist in perpetuity. The right to use these parcels was not an exclusive right conferred upon the lot-owners, but was subject to the right of the vendors themselves to use and to lease or license for picnic purposes; and the present owner, not being a purchaser without notice for value, derived no assistance from the Registry Act.

From this judgment the petitioner appeals and asks to have the judgment set aside and the claims dismissed. No grounds are stated in the notice of appeal for the relief asked.

Upon the argument, the question as to whether or not the petitioner was a *bonâ fide* purchaser for value without notice arose, and, by consent of counsel, Sidney Small, the petitioner, was called as a witness and examined in Court. He stated that he was a purchaser at the sale by public auction, and signed the contract to purchase. He did not remember any discussion or anything being asked as to the quantity of property sold or in respect of the vacant spaces, but would not like to contradict the witness Jephcott; he did not remember. The whole thing was just at large.

Mr. Bicknell's argument in substance was that his client's rights were governed solely by the terms of the deed, and it was purely a question of construction; that the purchase of a lot gave only a right to the necessary street fronting the lot; that a grant of "commons" is unknown to the law and cannot be defined; it is not an easement or restrictive covenant and does not run with the land; rights of amusement are unknown to the law; and that his client, shewing a chain of title in fee simple to the blocks X, Y, and Z, was entitled to be declared to be the owner in fee simple of the same.

The question is largely one of facts, a short review of which

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is necessary before referring to the law bearing upon the case. I take the facts largely from the carefully reasoned judgment of the learned Referee.

In July, 1886, the Toronto and Lorne Park Summer Resort Company was incorporated by letters patent under R.S.O. 1887, ch. 157. Upon its incorporation the conveyance was made to the company of the principal part of the land in question, to which an addition was made in May, 1889, and the company acquired the water lots in March, 1890. The purposes for which the company was organised are stated in the patent to be: "To purchase, own, and improve Lorne Park as a summer resort; (a) to make such improvements and alterations as may be deemed expedient or advantageous; (b) to erect and construct thereon all kinds of structures and buildings; (c) for the purposes of the company to erect and maintain wharves, docks, piers, and breakwaters; (d) to construct and maintain all necessary and desirable roads, bridges, streets, avenues, and sewers, and other conveniences of all kinds whatsoever, for the improvement of the park; (e) to sell, lease, mortgage, or exchange the whole or portions of the said park or any of the structures or buildings now or hereafter erected thereon; (f) to own; (g) to run a line of steamers between the park and other places; (h) to enter into contracts for providing entertainments for the public on the property of the company; (i) to charge fees for the privileges of the park; (j) to buy adjoining property for park purposes; (k) to borrow on security of park property."

It was intended to be a summer resort for permanent summer residents and transient guests; a private park open only to those whom the company saw fit to admit to its privileges. Access to it was by a gate on the Lake Shore road and by a wharf on the lake shore. The whole area was between 80 and 90 acres, laid out into lots and streets and undesignated places, aggregating about 25 acres. Many lots were sold; the form of deed common to all is made in pursuance of the Act respecting Short Forms of Conveyances; and, besides the usual covenants, contains a covenant that the grantors will pay off an existing incumbrance of \$9,000 upon the park property and indemnify the purchaser against the same; and, *inter alia*, the following clause:

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"It is hereby agreed that the party of the second part, his heirs, executors, administrators, and assigns, and his or their families, subject to the by-laws of the company, shall have free access to the streets, avenues, terraces, and commons of the said park, and shall have free ingress and egress for himself and themselves, his and their family or families, servants and agents, with horses and carriages or other vehicles, to and from the said lands by any of the streets or avenues in the said park, and, subject as aforesaid, shall have free ingress and egress to and from the said park at any wharf or wharves in front thereof. . . ."

It further provides that the vendors shall have the right to pass by-laws and make regulations for the construction of sewers, drains, watercourses, waterworks, and for all kinds of street improvements in streets, avenues, terraces, and *commons* adjoining to the said lands, and also for lighting all or any of the streets, avenues, terraces, or other public parts of the said park adjacent to the said lands; and *the lands hereby granted, and the owners* thereof to the extent of the value of said lands, shall be liable to contribute to the cost of all the above named improvements equally with all other lands that are adjacent to the said streets, avenues, terraces, and *commons* wherein said improvements are made, such contributions to be assessed equally against each lot so situated.

By deed dated the 3rd June, 1891, the Toronto and Lorne Park Summer Resort Company conveyed to one Frederick Roper all the property and estates of the company set forth in the schedule annexed, the consideration being \$1 and the assumption of a certain mortgage. In the schedule is found a description of the lands "save and except certain blocks and lots of land which have been sold and which are coloured pink on the small lithographed plan of the same which accompanies this document." On the plan so referred to, and which forms part of the deed, the three blocks in question are shewn. Block X shews a pavilion and is marked "ball ground;" block Z shews a circle which is marked "reservoir;" block Y shews a building which is marked "picnic dining hall."

This conveyance, as the Referee finds, appears to have been preliminary to organising a new company to take over the park

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property. The Lorne Park Company Limited was incorporated by letters patent on the 18th June, 1891, for the same purpose as the Toronto and Lorne Park Summer Resort Company had been incorporated, and on the 7th July, 1891, Frederick Roper conveyed to the Lorne Park Company Limited the unsold portions of the park, and to the deed is attached a plan similar to that forming a part of the Roper deed and referred to in the same manner as in that deed.

On the 23rd January, 1909, the Lorne Park Company mortgaged the property to Earles and others, all of whom had been shareholders in the original company. The mortgage having become in default, the property was sold to the petitioner, Sidney Small, who became the purchaser.

The learned Referee finds that inducements were held out to the purchasers that they would have the benefit of public recreation grounds provided by the company, and facilities would be offered for holding picnics to all who chose to patronise the park for that purpose, and were willing to pay the charges which the ferry company saw fit to impose. For this branch of their business the company mainly devoted block Y. Here was provided a place for taking meals and refreshments, and hot water and other facilities were furnished picnic parties, for their enjoyment, and a dining-hall and seats and tables; "the rest of the place being, as I understand it, enclosed."

I agree with the learned Referee that blocks X and Z were used as a common playground open to all the cottagers, and were two of the places intended by the word "commons," and that the lot-owners have a right to free access thereto, which ought not to be interfered with by the petitioner; but I cannot agree with him that a different consideration should apply to block Y. As he very truly points out, it was equally open and accessible to all as the other two blocks; and, while it was not used as frequently as the other two, it was used at the will and pleasure of the cottagers as a common and place of resort, and the evidence shews that the owners of the cottages could and did resort thereto and make use of the seats and tables there provided; and I agree with my brother Middleton that no distinction ought to be made between the three blocks as to the rights of the cottagers in respect of the same.

I am also clearly of opinion that the petitioner cannot claim as a *bonâ fide* purchaser for value without notice. There is no doubt that sufficient was said at the time of his purchase to put him on inquiry as to the rights of the cottagers; but, whether he was put upon inquiry or not, I am of opinion that the word "commons" in the deeds to the various cottagers had reference to these three blocks, and that the plan annexed to and forming part of his chain of title through Roper was express notice that these blocks were reserved and used for the general benefit of the park owners, including the cottagers. Both the Referee and my brother Middleton find, properly as I think, that the word "commons" is not used in the deeds in its more strict and literal sense, and carries with it a meaning wide enough to cover the rights of the claimants to the use of the lands in question. As used here, it is an ambiguous term, which requires explanation, and which may be explained by circumstances.

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As pointed out by Lord Hobhouse in *Municipal Council of Sydney v. Attorney-General for New South Wales*, [1894] A.C. 444, 453, referred to by my brother Middleton: "It is very often used, though inexactly and in popular parlance, to denote land devoted to the enjoyment of the public or of large numbers of people."

I think in the present case the evidence is perfectly clear that it was so used. To exclude these three blocks as not covered by it in the deeds would make the deed practically inoperative in that regard; and from the evidence properly admissible there can be no doubt that it was intended, as contended by the claimants, to be so used.

In addition to the cases referred to by Middleton, J., see also 13 Cyc. 444 (IV.A.): "The doctrine expounded in the early English cases was applied to highways, but was gradually extended to all kinds of public easement, such as squares, parks, wharves, etc., and has been held to include even privileges of a semi-public character, such as those in churches and cemeteries." *Bateman v. Bluck*, 18 Q.B. 870, and other cases there cited.

Again, in 13 Cyc. 448 (D.): "The full applicability of the doctrine of dedication to parks and public squares and commons

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is now generally recognised, and where land is dedicated for a public square without any specific designation of the uses to which it can be put, it will be presumed to have been dedicated to such appropriate uses as would under user and custom be deemed to have been fairly in contemplation at the time of the dedication."

Here, no doubt, the dedication was not to the public, but was of a quasi-public nature, limited to the general use of those who became owners of lots and residents within the park and their friends who might visit them, and others to whom the company gave, for the time being, the privilege of user.

The deed which, it was admitted, is common to all the purchasers of lots within the park, contains a covenant in favour of the purchaser, that he, "his heirs, executors, administrators, and assigns, and his or their families, subject to the by-laws of the company, shall have free access to the streets, avenues, terraces, and *commons* of the said park," and free ingress and egress to and from the said park at any wharf or wharves thereof.

I agree with the learned Referee and my brother Middleton that the word "*commons*," as used in the deeds to the purchasers of lots, was not intended to have any strict or technical meaning, but to signify certain places in the park which were to be open and free to all for the purposes of general enjoyment and amusement, and I have nothing to add in that respect to the view so clearly expressed in the Court below. The covenant being thus in favour of the purchasers, and having relation to a building scheme of lots known as Lorne Park, it thereby became restrictive in its effect as against the vendor of those lots, and those claiming under him. It could not operate in favour of the purchasers giving them the right to use the spaces referred to as commons without impliedly restricting the vendors from doing any act or thing, whether by sale or otherwise, which would preclude the purchasers from the enjoyment of the right which they had purchased and paid for.

The leading case is that of *Renals v. Cowlishaw*, 9 Ch. D. 125, affirmed on appeal, 11 Ch.D. 866; and in the House of Lords, in *Spicer v. Martin*, 14 App. Cas. 12, Lord Macnaghten, refer-

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ring to this case (p. 23), said: "The law on the subject has never been stated more clearly than it was by Vice-Chancellor Hall in *Renals v. Cowlishaw*. The opinion of that learned Judge on any question relating to conveyancing and real property law, owing to his great experience as a conveyancer, would of itself carry the utmost weight. In this instance his opinion was emphatically confirmed in the Court of Appeal by Lord Justice James. . . . It has also . . . been approved and followed in the Queen's Bench Division in *Nottingham Patent Brick and Tile Co. v. Butler* (1885), 15 Q.B.D. 261, 269; *S.C.* on appeal (1886), 16 Q.B.D. 778. 'It may, I think,' observes the Vice-Chancellor, 'be considered as determined that any one who has acquired land, being one of several lots laid out for sale as building plots, where the Court is satisfied that it was the intention that each one of several purchasers should be bound by and should as against the others have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that this right, that is, the benefit of the covenant, enures to the assign of the first purchaser; in other words, runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant but wherever a mutual contract can be sufficiently established. . . . And such covenant need not be express, but may be collected from the transaction of sale and purchase.' . . . Those principles, as defined by the Vice-Chancellor, are, I think, perfectly sound, consistent with the authorities, and consistent with good sense. I think they apply to the present case, and I think they must govern it. If the site of the houses now known as Cromwell Gardens had been put up for sale by public auction in building lots, according to a plan corresponding with that on Mr. Martin's lease, and if the conditions of sale had prescribed that houses should be built such as those which have actually been erected, and that every purchaser should bind himself by a covenant, in the terms of the restrictive covenant now in question, no one, I think, could have doubted that each purchaser would, as against the vendor, and as against every co-purchaser, have had a right to the benefit of the covenant, although there might have been no direct stipulation to that effect, and no ex-

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press provision for mutual covenants by the purchasers *inter se*. What difference is there in substance between the case I have supposed and the case which has occurred? The site was laid out in accordance with a building scheme. The houses were to be built as private houses, and to be used for no other purpose: a covenant to that effect was imposed on the builder who bought the ground, and intended to parcel it out and sell it, or let it again. The houses were actually built as private houses, and offered to the public as such. Their character was unmistakable; and every person who took one of the houses was required to enter into the same restrictive covenant. All this in one way or another was brought to Mr. Martin's knowledge. Every lessee in the ordinary course must have had the same information as Mr. Martin had. Every lessee must have known that every other lessee was bound to use his house as a private residence only. This restriction was obviously for the benefit of all the lessees on the estate; they all had a common interest in maintaining the restriction. This community of interest necessarily, I think, requires and imports reciprocity of obligation. As regards the appellant, the case, I think, is doubly clear. It seems to me that when Mr. Spicer put his houses in Cromwell Gardens on the market he invited the public to come in and take a portion of an estate which was bound by one general law—a law perfectly well understood, and one calculated and intended to add to the security of the lessees, and consequently to increase the price of the houses. The benefit of that increase, whatever it was, Mr. Spicer got. Can he or his representative be permitted to destroy the value of the thing he sold by authorising the use of part of the estate for a purpose inconsistent with the law by which he professed to bind the whole?"

Lord Watson, referring to the judgment of Lord Macnaghten, said that he found there all that he desired to say himself.

In my opinion, the principle here enunciated applies to the present case, which should be governed by it. The incorporation of the original company shews clearly that its object and purpose was a building scheme, and that the duties of the company and of the purchasers were correlative, and that there was what has conveniently been termed a "law" common to both

for their mutual benefit. The subsequent patent of incorporation, changing the name, reaffirmed the purpose. The mutual duties, express and implied, in the various conveyances to purchasers set forth the mutual obligations to carry out the original purpose. The literature published and the representations made by the chief officers under which purchasers were invited, and their conduct through a period of some 25 years, recognising the mutual relations between the vendors and the purchasers, all shew that the original scheme during this long period was not departed from, and the conveyances through which the petitioner claims his title, and particularly the pink plan referred to and forming a part of the Roper deed, and having special reference to the three blocks in question, and the express notice given to the purchaser (the petitioner) at the time of the purchase, put it beyond doubt that he was not a *bonâ fide* purchaser for value without notice of the object and purpose of the building scheme and of the "law" governing the same.

The principle in *Spicer v. Martin* was applied in *Mackenzie v. Childers*, 43 Ch. D. 265, referred to in the judgment appealed from. In that case, referring to *Renals v. Cowlishaw*, Kay, J., (p. 276), quotes thus from the judgment of Vice-Chancellor Hall: "This right exists not only where the several parties execute a mutual deed of covenant, but wherever a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant need not be express, but may be collected from the transaction of sale and purchase;" and proceeds: "To apply that language I should in this case, if there were no express covenant, 'collect from the transaction of sale and purchase' an implied agreement by the vendors with every purchaser that none of the unsold lots should be built upon in a manner inconsistent with the building scheme, or at least that they would not authorise such a departure from the scheme;" and he held that the recital in the deed was not a mere expression of intention which the vendors were at liberty to change, but the effect of the deed was that the vendors thereby

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entered into a covenant not to authorise the use of the unsold plots in a manner inconsistent with the building scheme as therein expressed; that, even if the deed had not the effect of a covenant by the vendors, yet the trustees were bound by a contract, implied from the whole transaction, restricting their dealing with the land in violation of the building scheme; and that an injunction ought to be granted restraining them from authorising any purchaser to build contrary to the building scheme.

The views here expressed are, I think, applicable in principle to the present case. Having regard to the building scheme here inaugurated and put upon the market, the covenant giving to the purchasers the rights in respect of what are called the commons clearly created an obligation on the part of the vendors that this right should not be encroached upon by them or purchasers from them.

In *Davis v. Corporation of Leicester*, [1894] 2 Ch. 208, it was held by North, J., that the publication of particulars and conditions in that case was, to use Lord Macnaghten's language in *Spicer v. Martin*, an invitation to the public to come in and buy portions of the estate upon the footing of the general building scheme put forward therein, intended to bind all the purchasers as likely to be for the benefit of all, and to enhance the value of their respective properties, and, consequently, to increase the price they would be willing to pay for their respective lots. The rights of the purchasers *inter se*, when such a scheme exists, to enforce the provisions thereof against one another, and the obligation attaching to the vendors to observe and perform the same, are now thoroughly settled and recognised; and reference is made to the cases above quoted; and it was there held by North, J., and the Court of Appeal, that, if the corporation had been ordinary individuals, they would have been bound by the original building scheme.

The principle was also applied in *Elliston v. Reacher*, [1908] 2 Ch. 374, and Parker, J., points out the requirements necessary to bring the principles of *Renals v. Cowlishaw* and *Spicer v. Martin* into operation, and states (p. 385): "It is, I think, enough to say, using Lord Macnaghten's words in *Spicer v. Martin*, that where the four points I have mentioned are estab-

lished, the community of interest imports in equity the reciprocity of obligation which is in fact contemplated by each at the time of his own purchase.”

I would dismiss the appeal with costs.

MULOCK, C.J.Ex., and SUTHERLAND, J., concurred.

RIDDELL, J., agreed in the result.

Appeal dismissed with costs.

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[MIDDLETON, J.]

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Dec. 29.

Company—Winding-up under Dominion Act — Foreign Company Doing Business in Canada—Jurisdiction — Prior Liquidation Proceedings Abroad—Distribution of Assets—Domestic and Foreign Creditors—Equality—Duty of Liquidator.

The Winding-up Act, R.S.C. 1906, ch. 144, applies to all companies carrying on business in Canada. The jurisdiction of the Court to wind up a company is not taken away or defeated by the fact that a winding-up order has already been made in a foreign country—even in the country of the company's origin. As soon as a winding-up order is made, the provisions of the Dominion statute apply, and control the entire situation.

A foreign company, which had carried on business in Canada, and was in liquidation in the Courts of the country of its origin, was being wound up in Ontario, under orders made by the Supreme Court of Ontario, subsequent to the foreign liquidation and at the instance of the foreign liquidator. In the winding-up, claims were proved by both Canadian and foreign creditors. It appeared that in the foreign liquidation all creditors, foreign as well as domestic, would rank *pari passu* in the distribution of the assets, after payment of preferred claims:—

Held, that the winding-up in Ontario was in no sense ancillary to the proceedings in the foreign Court; the assets in the hands of the Ontario liquidator should be distributed among all the creditors of the company *pro rata*—there was no warrant in the statute for giving preference to the claims of creditors residing in Canada.

Held, also, that it was the duty of the Ontario liquidator to distribute the funds in his hands, and he could not discharge himself by remitting them to the foreign liquidator.

Banco de Portugal v. Waddell (1880), 5 App. Cas. 161, and *In re Klæbe* (1884), 28 Ch.D. 175, 177, referred to.

APPEAL by the American liquidator and foreign creditors of the company from an order of the Master in Ordinary, in a refer-

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ence for the winding-up of the company under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, directing the liquidator to ascertain the amount of creditors' claims allowed in the American liquidation, and to pay to the Canadian creditors, and to them only, such dividends as the united assets will pay, and then to remit to the American liquidator for distribution among the American creditors any balance that may then remain.

November 26. The appeal was heard by MIDDLETON, J., in the Weekly Court at Toronto.

A. J. Russell Snow, K.C., for the appellants.

R. C. H. Cassels, for the Ontario liquidator, the respondent.

December 29. MIDDLETON, J.:—This company is an Ohio company, and is in liquidation in the Ohio Courts. Subsequent to the American liquidation, and at the instance of the American liquidator, ordinary winding-up orders were made in Ontario. Creditors have been advertised for in the ordinary way, and claims have been proved by creditors residing in Canada, as well as by creditors residing in the United States.

The winding-up was made under the provisions of the Dominion statute, which applies to all companies carrying on business in Canada: *Allen v. Hanson* (1890), 18 S.C.R. 667. The jurisdiction of the Court to wind up a company under insolvency legislation is not taken away or defeated by the fact that a winding-up order has already been made in a foreign country, even though that country was the country of the company's origin: *Ex p. McCulloch* (1880), 14 Ch. D. 716; *In re Artola Hermanos* (1890), 24 Q.B.D. 640; *Ex p. Robinson* (1883), 22 Ch. D. 816.

When once a winding-up order is made, then, I think, the provisions of the Dominion statute apply, and control the entire situation. The winding-up under our statute is in no sense ancillary to the proceedings in the American Court. It is an independent and self-contained proceeding. The statute provides that, regard being had to secured claims and to certain preferences to wage-earners and the like, the assets shall be distributed among all the creditors of the company *pro ratâ*. There is no

warrant for giving preference to the claims of creditors residing in Canada.

If in the United States liquidation priority should be given to the American creditors, then the amounts that such creditors would receive under the American liquidation would be treated as payments made after the date of the Canadian winding-up, and regard would then be had to such payments in order to secure the equality contemplated by the Dominion Act. There was no evidence before me as to what course will be followed in the American liquidation; I, therefore, directed information to be obtained from the American liquidator; and I am now told that under the American liquidation all creditors, foreign as well as domestic, will rank *pari passu* in the distribution of the assets of the estate, after payment of preferred claims.

The American liquidator seeks to have the funds transmitted to him to make this distribution; but I take it that it is the duty of the Canadian liquidator to distribute the Canadian funds, and that he cannot discharge himself by remitting them to the American liquidator. The result would probably be the same, but the remitting of the funds to the American liquidator might render them liable to preferential claims not recognised in our liquidation, and might render them liable for the expenses of an American liquidation if the liquidator is not in funds.

This is in accord with *Banco de Portugal v. Waddell* (1880), 5 App. Cas. 161, where it was determined: "Where traders possess two properties, one situated abroad, and the other situated in this country, and there has been a petition for adjudication here, followed immediately, in point of date, by proceedings in insolvency abroad, and the foreign Court takes possession of the foreign property, as under a *cessio bonorum*, and employs it in paying the foreign creditors a dividend, such creditors cannot afterwards prove under the English adjudication, except on the condition of first accounting for what they have received abroad."

This is to ensure equality among all the creditors, and has no application where the foreign adjudication recognises the rights of all creditors, domestic and foreign, to share *pro rata*.

The judgment in *In re Klæbe* (1884), 28 Ch. D. 175, 177,

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where the right of English creditors to priority in the administration proceedings is denied and the cases are reviewed, is most instructive. There Pearson, J., says: "No doubt in a case in which French assets were distributed so as to give French creditors, as such, priority, in distributing the English assets the Court would be astute to equalize the payments, and take care that no French creditors should come in and receive anything till the English creditors had been paid a proportionate amount. But subject to that, which is for the purpose of doing what is equal and just to all the creditors, I know of no law under which the English creditors are to be preferred to foreigners. On the other hand the rule is they are all to be treated equally, subject to what priorities the law may give them, from whatever part of the world they come."

The appeal will, therefore, be allowed, and the matter remitted to the Master with the directions above indicated.

Costs of all parties may come out of the fund.

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[BRITTON, J.]

Dec. 30.

DEVITT V. MUTUAL LIFE INSURANCE CO. OF CANADA.

Life Insurance—Policy—Non-forfeiture Clause—Construction — Surrender Value—Period of Ascertainment—Proofs of Death—Waiver by Denial of Liability.

A policy of life insurance contained a non-forfeiture clause in part as follows: "If at time of default in payment of any premium on this policy after it has been in force for three years, the cash surrender value (less any indebtedness) shall exceed the amount of such premium . . . this policy shall not lapse but shall be continued in force for the time covered by said premium . . . :"—

Held, that, upon the true interpretation of the clause, the "cash surrender value" is the actual surrender value on the day of default—the assured is to have the benefit of the value as it grows *de die in diem*.

Bain v. Aetna Life Insurance Co. (1890-1), 20 O.R. 6, 21 O.R. 233, distinguished.

To an action upon a policy of life insurance, the defendants set up the defence that proofs of the death of the assured were not furnished to them; and also denied that they were liable upon the policy:—

Held, that, as all the facts were well-known to the defendants before action and before the denial by the defendants of their liability, the denial of liability was a waiver of formal proofs of death—which were in fact duly furnished, but not until after the commencement of the action.

ACTION to recover the amount of an insurance upon the life of Ernest F. Carlson, deceased.

The action was tried by BRITTON, J., without a jury, at Berlin.

R. S. Robertson, for the plaintiff.

W. H. Gregory, for the defendants.

December 30. BRITTON, J.:—Ernest F. Carlson, in his lifetime of Edmonton, Alberta, effected an insurance upon his life with the defendants for the sum of \$2,000, and received a policy for that amount, dated the 28th day of March, 1910.

Carlson died on the 2nd day of February, 1914, at the city of Los Angeles, State of California.

The plaintiff obtained letters of administration of the estate of Carlson, and has brought this action to recover the amount of the said policy.

The defendants plead as a defence that the plaintiff did not, nor did any person on his behalf, furnish or deliver to the defendants proofs of the death of the assured. To this defence the plaintiff says that such proofs were in fact delivered, but they were unnecessary, as the defendants denied their liability and repudiated the plaintiff's claim. The plaintiff did put in formal proofs, upon blanks furnished by the defendants, of the death of Carlson, but not until after the commencement of this action. All the facts were well-known to the defendants before action and before the denial by the defendants of their liability. The denial of liability, under the circumstances disclosed, was a waiver of formal proofs of death.

Counsel for the defendants did not urge the objection that formal proofs were not put in before action, if I considered them sufficient. In my opinion, they are quite sufficient in form and substance.

The main defence is, that there was, at the time of the death of Carlson, an unpaid loan to the deceased upon the policy, and an unpaid part of the premium due the 1st April, 1913, and, by reason of these debts, the policy became void. That may be so apart from the special provision in regard to non-forfeiture contained in this policy. None of the cases cited and none of the decisions, so far as I am aware, deal with the neat point in regard to forfeiture and non-forfeiture which arises in the present case. On the third page of the policy, clause 3, "termina-

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tion and revival" are dealt with, and this clause has these words: "If any premium or written obligation given therefor be not paid when due, *except as provided* in the clause respecting *non-forfeiture* hereinafter contained," etc., etc.

The non-forfeiture clause is as follows (p. 3(9)): "If at time of default in payment of any premium on this policy after it has been in force for three years, the cash surrender value (less any indebtedness) shall exceed the amount of such premium, whether yearly, half-yearly, or quarterly, this policy shall not lapse but shall be continued in force for the time covered by said premium. At the end of said term or succeeding terms, upon the maturity and default of subsequent premiums, if the cash surrender value (less any indebtedness) is sufficient to pay the premium then due—or a premium for a period of not less than three months—this policy shall be continued in force until the end of such period, when, however, it will lapse and the company's liability cease, unless the succeeding premium be paid in cash within the thirty days of grace. All premiums in default, with interest at six per cent. compounded yearly, shall be a first lien and charge against the policy."

There is no dispute about questions of fact. Both parties rely upon, and the issue depends upon, the proper interpretation of the above "non-forfeiture" clause.

This policy, at the time of default, had been in force for more than three years. The annual premium was \$55.50, payable on the 1st day of April in each year. The premiums for 1910, 1911, and 1912 had been paid; that of 1912 had been paid by loan from the defendants upon the policy; the premium due on the 1st April, 1913, had been paid in part. The defendants by their letter of the 3rd March, 1914 (exhibit 17), say that this policy lapsed on the 30th September, 1913.

The letter states, and no doubt the policy account then stood:—

September 30th, 1912, loan to pay premium of April,	
1912, \$55.50 and interest thereon \$1.40	\$56.90
Promissory note given to pay balance on premium due	
1st April, 1913	15.25

\$72.15

Although the defendants say that the policy had lapsed on the 30th September, 1913, it is to be noticed that there had been no demand for payment of the principal of the loan of \$56.90, and the defendants had accepted the interest upon it up to the 30th September, 1913, and the agreement provides for payment of interest and compounding the interest if a loan is treated as a continuing loan.

The \$15.25, balance on the premium for 1913, is represented by a note dated the 7th July, 1913, at three months; that note became due on the 10th October, 1913. There was in fact the \$56.90 due to the defendants from Carlson on the date mentioned. The note for \$15.25 carries interest at 6 per cent., 24 cents for three months, and adding it to the \$72.15 will make the total debt of the assured to the defendants \$72.39 on the 30th September, 1913.

I mention these particulars of the account as they have a bearing upon the right of the defendants to declare a forfeiture.

The contention of the defendants is, that the surrender value of the policy on the 30th September, 1913, was \$68. If that be the true amount, and the indebtedness be taken at \$72.39, there would be a deficiency of \$4.39.

The plaintiff contends that the surrender value is not limited to the amount mentioned in the table, but is the true surrender value at the time of default. The plaintiff cannot tell what the true surrender value was; but *primâ facie* the defendants have fixed it as a growing amount *de die in diem*. In the table: 1913, \$68; 1914, \$94; 1915, \$122; 1916, \$150; and so on to the end of the 20th year, when the amount would be, if the policy continued, \$958.

The difference between the 1st April, 1913, and the 1st April, 1914, is \$26. If half that amount, say \$13, is added to the \$68, the surrender value would be \$81, enough to pay all the debt and allow a surplus of \$8.61. This pays all the indebtedness of Carlson, thus paying the balance of premium due the 1st April, 1913, and so should continue the policy until the 1st April, 1914. The actuarial work necessary to do this has reference to this policy alone—or all policies for the same amount with the same premium due the same day. It would be no more difficult for the defendants to arrive at the surrender value on the 30th Sep-

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tember than on the 1st April. The basis of yearly findings is applicable to half-yearly, or, for that matter, monthly or oftener.

This is not a case of voluntary surrender. Surrender values as provided for in No. 10 of the "privileges and conditions" are cash surrender values as shewn in the table. That is an entirely different thing from the automatic working out of the non-forfeiture provision. If a policy-holder surrenders, he gets cash—according to a table; if he does not surrender, but is unable to pay his premium, he gets what may be to the credit of his policy as a surrender value, not according to a table, but according to what the surrender value really is; and he does not get cash, but he gets extended insurance.

This case differs from *Bain v. Aetna Life Insurance Co.* (1890-1), 20 O.R. 6, 21 O.R. 233, and cases of that kind. Here there is no complaint as to the basis or principle on which profits are made and allotted, and no error in calculation or computation is alleged. The complaint here is, that the contract calls for surrender value at a later date than the 1st April, 1913. The policy had in fact a greater surrender value on the 30th September than on the 1st April; and it is said that the defendants know or can know what the true value is, and should give the policy-holder the benefit of it. If the defendants' contention is correct, on default five minutes before twelve on the night of the 31st March, 1914, the surrender value of this policy would be \$68, and five minutes after twelve on the morning of the 1st April the value would be \$94.

The defendants issue this policy as an attractive and liberal one, and it certainly is. It works out to the advantage of a policy-holder unable to continue to pay his premiums. This benefit to the policy-holder should not be cut down unless the contract clearly warrants it. The contract must be construed strictly against the defendants on their claim that the policy lapsed or became forfeited on the 30th September, 1913. The non-forfeiture clause was intended to override to a certain extent these clauses in the policy, and in the application for insurance. Neither in the application for the insurance, nor in the application for the loan, nor in the policy itself, is there anything that limits the surrender value to the amount mentioned in the table.

Returning to the condition: there was the default in payment of premium due the 1st April, 1913. The surrender value must exceed the indebtedness—first, by way of loan, and second, for premium. The premium was reduced to \$15. If the surrender value was \$81, and the debt \$56.90, the balance was \$25.10, and so exceeded the premium, which was \$15, and which, when paid, would continue the policy to the 1st April, 1914.

Although the surrender value enures to the benefit of the policy-holder by continuing the policy in force, the defendants have not been paid the amount in cash; so the amount should be deducted from the amount of the policy:—

Policy	\$2,000.00
Debt, loan, and interest	\$60.39
Debt, balance of premium and interest.....	15.50
	<hr/> 75.89
	<hr/> \$1,924.11

There will be judgment for this sum, with interest at 5 per cent. per annum, from the 23rd September, 1914, the date of the issue of the writ, and with costs.

[This decision was reversed by a judgment of the Appellate Division delivered on the 22nd March, 1915. The reasons for judgment will be reported in due course. See 8 O.W.N. 210.]

[IN CHAMBERS.]

RE CITY OF BERLIN AND THE COUNTY JUDGE OF THE COUNTY OF
WATERLOO.

Britton, J.

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v.
MUTUAL
LIFE
INSURANCE
Co.
OF CANADA.

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Dec. 30.

Municipal Corporation — Resolution of Council Requesting Inquiry by County Court Judge—Charges against Police Force—Authority of Police Commissioners—Municipal Act, R.S.O. 1914, ch. 192, sec. 248—Construction and Scope—Jurisdiction of Judge—Refusal of Mandamus.

By sec. 248 of the Municipal Act, R.S.O. 1914, ch. 192, the Judge of a County Court is given jurisdiction, upon the request of a municipal council, to investigate certain matters, "or to inquire into or concerning any matter connected with the good government of the municipality, or the conduct of any part of its public business:"—

Held, that the inquiry authorised is limited to matters within the jurisdiction of the municipal council, and is to be made with a view to obtaining a report for the guidance of the council in dealing with matters over which it has authority.

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In the scheme of municipal government some matters concerning the welfare of the inhabitants are taken from the jurisdiction of the municipal council and vested in other legislative and administrative bodies. Thus affairs relating to the police force are placed in the hands of Police Commissioners, whose authority, with respect to matters over which they have jurisdiction, is paramount.

And it was *held*, refusing a motion for a mandamus, that a County Court Judge rightly declined to proceed with an inquiry, under a resolution of a city council, into certain charges of misconduct and lack of harmony in the police force of the city.

Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co. Limited (1913), 17 Commonwealth L.R. 644, [1914] A.C. 237, *Godson v. City of Toronto* (1890), 18 S.C.R. 36, *Kelly v. Barton* (1895), 26 O.R. 608, 22 A.R. 522, and *Winterbottom v. London Police Commissioners* (1901), 1 O.L.R. 549, 2 O.L.R. 105, followed.
Lane v. City of Toronto (1904), 7 O.L.R. 423, distinguished.

MOTION by the Corporation of the City of Berlin for a mandamus to the Senior Judge of the County Court of the County of Waterloo directing him to proceed with an inquiry, under a resolution of the city council, into certain charges of misconduct and lack of harmony in the police force of the city.

December 22. The motion was heard by MIDDLETON, J., in Chambers.

H. J. Sims, for the applicant corporation.

Edward Bayly, K.C., for the County Court Judge.

December 30. MIDDLETON, J.:—By the Municipal Act, R.S.O. 1914, ch. 192, sec. 248, where the council of a municipality passes a resolution requesting a Judge of the County Court to investigate any matter relating to a supposed malfeasance or breach of trust or misconduct on the part of a member of the council, or an officer, or a servant of the corporation, “or to inquire into or concerning any matter connected with the good government of the municipality, or the conduct of any part of its public business,” it thereupon becomes the duty of the Judge to make the inquiry directed, and the Judge is given for the purpose of that inquiry all the powers which may be conferred upon Commissioners under the Public Inquiries Act.

The police of the City of Berlin are in charge of a Board of Commissioners constituted under secs. 354 *et seq.* of the Municipal Act. The Board in this case consists of the Mayor, the Police Magistrate, and the Junior Judge of the County, who has

been designated by the Lieutenant-Governor in Council. The resolution in question requests the Senior Judge of the County to conduct this inquiry.

The learned Judge has declined to enter upon the inquiry; taking the view that what is now sought is not within the scope of sec. 248, and that he cannot be called upon to investigate matters which properly fall within the jurisdiction of the Board of Police Commissioners.

Upon this motion an affidavit is filed by the Police Magistrate stating that all complaints of every kind which have been made to the Board of Police Commissioners have been investigated and dealt with by the Board.

I think the learned Judge is right in the position which he takes. The words which I have quoted from sec. 248 are undoubtedly very wide. Practically everything in one way or another concerns the good government of the municipality, and some limitation must necessarily be found to the wide terms used. Similar wide expressions are found in sec. 250: "Every council may pass such by-laws and make such regulations for the health, safety, morality, and welfare of the inhabitants of the municipality . . . as may be deemed expedient." No one supposes that his general provision confers unlimited jurisdiction upon the municipal council; yet it might well be argued that all laws dealing with every possible topic are presumed to be passed in the interest of the health, safety, morality, and welfare of the inhabitants.

A somewhat similar problem has recently been faced in Australia, in the case of *Colonial Sugar Refining Co. Limited v. Attorney-General for the Commonwealth of Australia* (1912), 15 Commonwealth L.R. 182, *Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co. Limited* (1913), 17 Commonwealth L.R. 644 and [1914] A.C. 237. There, an Act had been passed authorising inquiry of the widest possible nature, and a commission had been issued directing an inquiry into the sugar industry. One of the industries to be investigated attacked the Act, and brought action claiming a declaration of the invalidity of the Act and an injunction to restrain the investigation contemplated. It was admitted that

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the investigation was concerning a matter over which the legislative body had no jurisdiction under the constitution as it stood; but it was said that the inquiry concerned the good government and welfare of the community, and that what was sought was material upon which to base proceedings looking towards an amendment of the constitution. The Privy Council held that the Act was *ultra vires*, and that the Legislature had no authority to direct an inquiry with reference to a matter outside of some actually existing power possessed by the Legislature, either under the constituting statute or at common law; and that, therefore, there was no power to direct a general inquiry—more particularly an inquiry into matters which had been excepted from the jurisdiction of that particular legislative body.

This principle appears to me to be entirely applicable here. In our scheme of municipal government some matters concerning the welfare of the inhabitants are taken from the jurisdiction of the municipal council and vested in other legislative and administrative bodies. School affairs are entrusted to school boards and boards of education; certain public utilities are placed in charge of boards specially constituted; and the affairs relating to the police force are placed in the hands of Police Commissioners. I do not think it is competent for the municipal council to direct an inquiry before the County Judge into the matters entrusted to these independent bodies. Within the limits of the jurisdiction conferred upon these bodies they are supreme and in no sense subordinate to the municipal council. This has been demonstrated in a series of cases in which the municipal council has undertaken to review the action of school boards.

The unseemly results, if this is not so, are quite apparent upon most superficial consideration of the situation. The Board of Police Commissioners, consisting of the Mayor, the Police Magistrate, and one of the County Judges, has considered and dealt with the very matters now to be inquired into. The council now suggest that the whole matter be reviewed by the other County Judge. The Police Commissioners have the authority to act, and no doubt have acted, in accordance with their views. The County

Judge who is asked to investigate has no power to take any action upon the evidence brought before him. His only function is to report to the municipal council. The municipal council, then, has no power to act, for the matters in question are not within its jurisdiction, but under the charge of the Police Commission. If there is the right to have the inquiry, the inquiry might just as well be directed to take place before the County Judge who is himself a member of the Police Commission. In many counties this must be so, because there is only one Judge in the county; and, speaking generally, the Senior Judge is the member of the Board; and the council, if it has the power, may direct that the conduct of the Senior Judge and his colleagues be investigated by the Junior Judge sitting alone.

For these reasons, I think I am bound to hold that the inquiry authorised by sec. 248 can only be directed concerning matters within the jurisdiction of the municipal council and with a view to obtaining a report for the guidance of the municipal council in dealing with matters over which it has authority.

The scope of the inquiry and its purpose is, I think, well indicated in *Re Godson and City of Toronto* (1888-9), 16 O.R. 275, 16 A.R. 452, *Godson v. City of Toronto* (1890), 18 S.C.R. 36. Paramount authority of the Board of Police Commissioners with respect to matters over which it has jurisdiction is established in *Kelly v. Barton* (1895), 26 O.R. 608, 22 A.R. 522; and *Winterbottom v. London Police Commissioners* (1901), 1 O.L.R. 549, 2 O.L.R. 105.

The decision of my learned brother Britton in *Lane v. City of Toronto* (1904), 7 O.L.R. 423, is in no way in conflict with this view. There it was alleged that in a municipal election for members of the Council and Board of Education there had been corruption and misconduct. It was held that this was a matter connected with the good government of the municipality, and that an inquiry was justified under the statute. Manifestly so; what was to be investigated was the conduct of an election under the control of the council itself. Its officers were charged with misfeasance. No inquiry was sought into the conduct of the Board of Education; the inquiry was into the conduct of the election.

The motion fails and must be dismissed with costs.

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[MIDDLETON, J.]

Dec. 31.

McNIVEN v. PIGOTT.

Vendor and Purchaser—Agreement for Sale of Land—Inability of Vendor to Make Title—Rescission by Purchasers—Damages—Costs of Investigating Title—Loss of Bargain—Absence of Collusion—Vendor's Damages by Reason of Purchaser's Dealings with Land—Inability of Purchaser to Make Complete Restitution—Value of Buildings Destroyed.

By the judgment of the Appellate Division in this action (31 O.L.R. 365), it was determined that the plaintiffs were entitled to rescind the agreement made between them and the defendant for the sale of land to the plaintiffs, and a refund of the amount paid on account of the purchase-price was ordered. The Court also directed the defendant to pay the plaintiffs their costs of investigating the title to the land, and ordered a reference to a Local Master to ascertain the damages, if any, over and above these costs, to which the plaintiffs were entitled by reason of the defendant's failure to make title under his contract; and also to determine the damages, if any, to which the defendant was entitled by reason of the plaintiffs' dealings with the land:—

Held, upon appeal from the Master's report as to the damages, that the action was, in effect, for rescission of the contract, not upon the ground of any fraud, but upon the ground of the inability of the defendant to make a satisfactory title to the land; and rescission and the restitution to the plaintiffs of what they had paid could be awarded only upon the terms of the plaintiffs making restitution of what they had received, so that both parties might be restored to the positions in which they respectively were before the contract. The plaintiffs, having destroyed the buildings upon the land, could not make complete restitution; and the defendant was, therefore, entitled as damages to the amount assessed by the Master as the value of the buildings destroyed.

Held, also, that a contract for the sale of land is upon condition, implied where not expressed, that the vendor has a good title; if the vendor has no title or a defective title, the purchaser is entitled to no satisfaction for the loss of his bargain, unless he can shew sufficient to recover damages in an action for deceit, or unless the failure to make a good title arises not from the vendor's inability, but from his unwillingness, to implement his undertaking.

Flureau v. Thornhill (1776), 2 W. Bl. 1078, *Engel v. Fitch* (1868-9), L.R. 3 Q.B. 314, L.R. 4 Q.B. 659, and *Bain v. Fothergill* (1874), L.R. 7 H.L. 158, followed.

And in this case, where it was plain from the result of the action of *Pigott v. Bell* (1913), 5 O.W.N. 314, that the defendant's title was at all times good, and it was not suggested that there was any collusion or deliberate failure on his part, it was *held*, that the plaintiffs were not entitled to recover from him any damages in addition to the costs referred to.

APPEAL by the defendant and cross-appeal by the plaintiffs from the report of the Local Master at Hamilton.

December 23. The appeal and cross-appeal were heard by MIDDLETON, J., in the Weekly Court at Toronto.

G. Lynch-Staunton, K.C., and S. F. Washington, K.C., for the defendant.

W. S. MacBrayne, for the plaintiffs.

December 31. MIDDLETON, J.:—The facts giving rise to this appeal have already been before the Courts in more than one form. By an agreement bearing date the 12th March, 1913, Pigott, the owner of the lands in question, agreed to sell them to the plaintiffs for \$32,500. A good title was to be made within 14 days; in default, the sum deposited was to be repaid, and the offer was to be void, at the purchasers' option. Under the agreement, \$2,000 was to be paid as a deposit, \$4,000 on the 3rd April, 1913, and the balance remaining after the assumption of certain existing mortgages was to be paid on the 16th June, 1913, that being the date named for the closing of the sale. It is then provided that "we or any of us are to have possession at once of the said lands, to cut down trees, remove fences, clear off all obstacles necessary to put property in good saleable condition, survey and open up street through said property, sell or build on said property." It was also agreed that Pigott should have the free use of the house and 61 feet frontage on Wentworth street, as a dwelling, until the day fixed for closing.

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An agreement had been made with Mr. Bell, the owner of the adjoining lands, looking to the opening up of a street across both parcels. It was assumed that this agreement was spent by the lapsing of the time mentioned in it. The solicitor acting for both parties did not regard it as any defect in the vendor's title, and he told the purchasers that the title was satisfactory. Thereupon they entered into possession of the land and took down fences, removed hedges, and laid out a road which, it was contemplated, should be made through the property for the purpose of profitable subdivision.

Acting in perfect good faith and with a view to a profitable subdivision and sale of the land, the purchasers pulled down and removed a stable and some outbuildings upon the property. These were stone buildings, which, the Master has found, were worth \$2,000.

Mr. Bell gave notice that he did not assent to the view above indicated as to the effect of his argument, and he claimed to have the right to open up the street that that agreement contemplated across the Pigott land, notwithstanding the lapse of the time-limit contained in the agreement. This frightened the

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purchasers, and they declined to carry out the agreement, although they paid the second instalment on the purchase-price.

An application was made under the Vendors and Purchasers Act, which was heard by the Chief Justice of the King's Bench, and he refused to force the title upon the purchasers, thinking that the agreement constituted a cloud upon the title: *Re Pigott and Kern* (1913), 4 O.W.N. 1580.

This action was then brought to rescind the agreement and to recover back the purchase-price paid.

Thereafter, for the purpose of clearing up his title, Pigott brought an action against Bell. The result of this action was a declaration that the Bell agreement was spent, and formed no cloud upon Pigott's title. The judgment in that action, *Pigott v. Bell* (1913), is reported in 5 O.W.N. 314.

The present action afterwards came on for trial before the Chief Justice of the King's Bench, who decided in Pigott's favour; but his decision was reversed upon appeal, the Appellate Division on the 12th May, 1914, *McNiven v. Pigott*, 31 O.L.R. 365, determining that the plaintiffs were entitled to rescind the agreement by reason of what had taken place, and a refund of the amount paid on account of the purchase-price was ordered. The Court also directed the defendant to pay the plaintiffs their costs of investigating the title to the land in question, and referred it to the Master to take an account of the damages, if any, over and above these costs, to which the plaintiffs are entitled by reason of the defendant's failure to make title under his contract; and also to determine the damages, if any, that the defendant is entitled to by reason of the plaintiffs' dealings with the lands and premises.

Upon the reference, the plaintiffs claimed to be entitled to recover as damages the profits, or some sum to represent the profits, which would have accrued to them if the defendant had had a good title. They also claimed to recover an amount paid to a surveyor for work done in laying out a subdivision of the lands and the costs of litigation with this surveyor. The defendant claimed to be entitled to recover as damages the value of the buildings, etc., destroyed and removed by the plaintiffs.

The Master has disallowed the claims of both parties, save

that he has allowed to the defendant the sum of \$75 as representing the amount received by the plaintiffs from the sale of the salvage from the buildings removed. The Master has assessed at \$1,200 the damages that the plaintiffs are entitled to receive if in the result their claim should be upheld. He has in like manner assessed the defendant's damages, if he is entitled to succeed, at \$2,000. This, I understand, includes the \$75.

Both parties now appeal from the Master's report.

Dealing first with the defendant's appeal, the plaintiffs' action was in effect, and possibly in substance, for rescission of the contract, not upon the ground of any fraud, but upon the ground of the inability of the defendant to make what is deemed a satisfactory title to the land to be conveyed. In this case, and possibly also in the case of fraud (see *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392), there can only be rescission and the restitution to the plaintiff of that which he has paid under the contract, upon the terms that the plaintiff himself make restitution of that which he has received, so that the parties may be restored to the positions in which they respectively were before the contract. If, either from the plaintiff's own act or from misfortune, the plaintiff is unable to make restitution, he cannot rescind. This statement is, I think, justified by what is said in *Houldsworth v. City of Glasgow Bank* (1880), 5 App. Cas. 317, at p. 338; *Hogan v. Healy* (1877), Ir. R. 11 C.L. 119; *Clarke v. Dickson* (1858), E.B. & E. 148; *Rees v. De Bernardy*, [1896] 2 Ch. 437, at p. 446.

Manifestly in this case, owing to the destruction of the buildings, the plaintiffs cannot make complete restitution. This point does not seem to have been dealt with by the Appellate Division; but, if I understand the decision aright, the reference as to damages awarded to the defendant must be taken to be a reference to ascertain by how much that which the plaintiffs return falls short of complete restitution. Taking this view of the case, the defendant's right to receive the \$2,000 ascertained by the Master as being the value of his buildings which were destroyed, seems plain. As already stated, the \$2,000 should be deemed to include the \$75 already awarded.

Turning to the plaintiffs' appeal: in *Flureau v. Thornhill*

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(1776), 2 W. Bl. 1078, the principle is laid down that a contract for sale of land is merely upon condition, frequently expressed, always implied, that the vendor has a good title. If the vendor has no title or a defective title, and is acting without collusion, the prospective purchaser is entitled to no satisfaction for the loss of his bargain.

In *Hopkins v. Grazebrook* (1826), 6 B. & C. 31, this rule was modified. There, the vendor held out the estate as his own, well knowing that he had no title.

In *Bain v. Fothergill* (1874), L.R. 7 H.L. 158, *Hopkins v. Grazebrook* was overruled, and it was laid down that the rule in the earlier case must be taken to be without exception, unless the plaintiff could shew sufficient to entitle him to recover damages in an action for deceit.

In the meantime, in the case of *Engel v. Fitch* (1868-9), L.R. 3 Q.B. 314, L.R. 4 Q.B. 659, another principle had been established. It was there held that by the contract of sale the vendor had undertaken to use his best endeavours to make a good title, and where the failure to make a good title arose not from his inability, but from his unwillingness to implement his undertaking, special damages might be recovered.

In *Bain v. Fothergill*, it is quite plain that the law laid down in *Engel v. Fitch* was left undisturbed.

In *Day v. Singleton*, [1899] 2 Ch. 320, this principle was applied, and damages were awarded where the executor of a vendor induced a lessor to refuse his assent to the assignment of a lease; this being a deliberate breach of his contract to convey.

In *Lehmann v. McArthur* (1868), L.R. 3 Ch. 496, a landlord, of his own motion, unreasonably and improperly refused his assent. It was argued that the vendor was at fault, in that he did not resort to law to compel the landlord to assent; but the holding was that, although the vendor was bound to do all that was in his power to carry out his contract, his obligation did not compel him to litigate with the landlord.

Clergue v. McKay (1903), 6 O.L.R. 51, is an example of the type of case in which substantial damages may be awarded. There the vendor deliberately precluded himself from making a title, by selling to another, in fraud of his earlier contract.

Here it is plain, as the result of the litigation with Bell, that the defendant's title was at all times good. It is not suggested that there was any collusion or any deliberate failure on his part. Although Pigott ultimately brought an action to get rid of whatever cloud Bell's unwarranted claim cast upon his title, he was not bound to do this. It was beyond his obligation under his contract with the plaintiffs.

The result is, that the plaintiffs' appeal fails, while the defendant's appeal succeeds, and costs will follow the event.

A motion was made at the same time upon further directions. If the plaintiffs desire to carry the matter further, this is premature; but, if there is no intention to litigate further there should be judgment for the return of the balance of the purchase-money after deducting \$2,000, and the defendant should have the costs of the reference and of the motion for judgment.

[This decision was affirmed as to the plaintiffs' appeal and reversed as to the defendant's appeal by a judgment of the Appellate Division delivered on the 15th March, 1915. The reasons for judgment will be reported in due course. See 8 O.W.N. 107.]

[MIDDLETON, J.]

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Executors and Administrators—Distribution of Estate of Intestate—Duty of Administrator—Trustee and Cestui que Trust—Shares in Industrial Company—Election of two Beneficiaries to Take Shares in Specie—Refusal of Third to Consent—Remaining Beneficiaries under Disability—Advice and Direction of Court—Sale and Conversion of Estate—Statute of Distributions.

After payment of debts, the administrator of the estate of an intestate holds the estate in trust to convert and divide among those entitled under the statute to distribution, in precisely the same way that an executor holds an estate in trust under a will when he is directed to convert and distribute among several residuary legatees. The Statute of Distributions is nothing but a will made by the Legislature for an intestate; and his next of kin are entitled to elect to take the estate in specie. But until distributed the assets which are the subject of the trust are not the property of the beneficiary.

Cooper v. Cooper (1874), L.R. 7 H.L. 53, and *Sudeley v. Attorney-General*, [1897] A.C. 11, followed.

Where there is only one *cestui que trust*, or where the *cestuis que trust* are all of one mind and no complication arises from disability, the right to demand the delivery of the estate in specie—all other interests having been provided for—is incontrovertible. But, where the parties beneficially entitled are not of one mind, those of them who so desire are en-

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titled to insist upon the normal course of administration being pursued to the end. There can be no divergence from the statutory testament which would injuriously affect the right of any one *cestui que trust*.
Review of the authorities.

In re Marshall, [1914] 1 Ch. 192, specially referred to.

Where the estate of an intestate consisted of practically the whole of the capital stock of an industrial company, and his next of kin were his widow and four children, two of whom were infants, and where it appeared that the widow and the eldest son, who were together entitled to one half the estate, desired to take their aliquot portions of the company-shares, but the adult daughter desired that there should be no partition of the stock, but that it should be held by the administrator until a realisation could take place at a fair price, it was *held*, that it was the duty of the trustee to refuse to transfer any portion of the stock to the beneficiaries unless all agreed. The statute directs a sale and conversion; and, in the absence of consent, this must govern.

MOTION by the administrator of the estate of Andrew D. Harris, deceased, for the advice and direction of the Court in regard to the administration of the estate.

December 21. The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

D. Inglis Grant, for the administrator.

J. A. Macintosh, for the widow and adult son.

G. C. Campbell, for the adult daughter.

F. W. Harcourt, K.C., for the infants.

December 31. MIDDLETON, J.:—Andrew D. Harris died intestate on the 12th December, 1913, leaving him surviving his widow and four children, two of whom are now infants. At the time of his death, Mr. Harris was substantially the owner of a valuable factory business, as he held 2,994 shares out of 3,000 of the capital stock of the Ontario Sewer Pipe Company. This stock is of very considerable value, but at the present time, owing to the financial conditions now prevailing, the stock cannot readily be marketed; and, although the business of the company is large and profitable, it is plain that any attempt to wind up the company would be productive of great loss. There is a wide difference of opinion between those concerned as to the best course to pursue and as to the duty of the administrator.

The widow and the adult son desire the administrator to give them the shares that would be coming to them upon a distribution, that is, one-half of the 2,994 shares. The adult daughter,

on the other hand, desires that there should be no partition of the stock, but that it should be held by the administrator until a realisation can take place at a fair price. The infant children, represented by the Official Guardian, submit their rights to the Court, and of course they cannot make any election.

The adult daughter has since her infancy resided with her grandfather and her uncle, one Thomas Kennedy, who is the manager of the Dominion Sewer Pipe Company.

The matter first came before me upon a motion to determine how far the daughter was entitled to go in the examination of officers of the company for the purpose of indicating that the affairs of the company are not being properly managed and that moneys of the company were being improperly spent. It appeared to me that the inquiry was being pressed too far, but I did not think it wise to dispose finally of the motion, and I therefore directed that the motion stand over and that the main motion be argued, reserving liberty to allow the other motion to be prosecuted, and further materials in answer to be filed, if I came to the conclusion that the matters discussed had any bearing upon the rights of the parties under the circumstances.

There is, unfortunately, some hard feeling and a tendency to recrimination. It is said that the daughter is refusing to accept her share, seeking rather to serve the interests of the uncle, who stands *in loco parentis* to her, as manager of the opposition company. On the other hand, it is said that what has taken place in the past would indicate that the affairs of the company would probably be operated entirely in the interest of the widow and adult son if they received their portion; for this, with the outstanding shares which are held or controlled by the widow and son, would give to them the majority interest and controlling vote in the management of the affairs of the company.

I have come to the conclusion that this recrimination throws absolutely no light upon the situation, and that the motion must be dealt with upon the basis of the right or lack of right of those entitled to share in the estate to demand that their shares be given to them in specie. There are no creditors, and no rights need be considered save the rights of the widow and the children.

The question involved is not so devoid of authority as coun-

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sel apparently thought. There is no question that as soon as debts have been paid the administrator holds the estate in trust to convert and divide among those entitled under the statute to distribution, in precisely the same way that an executor holds an estate in trust under a will when he is directed to convert and distribute among several residuary devisees. As put in the case cited by Mr. Grant—*Cooper v. Cooper* (1874), L.R. 7 H.L. 53—“the Statute of Distributions is nothing but a will made by the Legislature for an intestate. His next of kin stand with regard to his personal estate in the same condition as does the residuary legatee under a will. The same law therefore applies to both. Either is entitled to elect to take the estate in specie.” But it must be borne in mind, as pointed out in *Sudeley v. Attorney-General*, [1897] A.C. 11, that until distributed the assets which are the subject of the trust are not the property of the beneficiary.

This, however, makes it necessary to consider the exact nature of this right of election. The case is simple where there is only one *cestui que trust*, or where the *cestuis que trust* are all of one mind and no complication arises from disability. There, as soon as all other interests have been provided for, the right to demand the delivery of the estate in specie is incontrovertible. But I think it is also well established that where the parties beneficially concerned are not of one mind, then the parties who so desire are entitled to insist upon the normal course of administration being pursued to the end. There can be no divergence from the donor's will or from the statutory testament which would injuriously affect the right of any one *cestui que trust*. That *cestui que trust* may compel a strict and literal adherence to the prescribed line of duty.

I think this correctly sums up the law to be derived from a large number of authorities. The general principle is clearly stated by Lord Cranworth in *Harcourt v. Seymour* (1851), 2 Sim. N.S. 12, at p. 45: “I take the law from this case to be perfectly clear. Where by a settlement land has been agreed to be converted into money, or money to be converted into land, a character is imposed upon it until somebody entitled to take it in either form chooses to elect that instead of its being con-

verted into money or instead of it being converted into land it shall remain in the form in which it is actually found."

The necessity of united action among beneficiaries, where the rights of all are affected, is pointed out in *Holloway v. Radcliffe* (1856), 23 Beav. 163, and *Chalmers v. Bradley* (1819), 1 J. & W. 51; but, where the trust is to convert money into land, it has been held that any one entitled to the money may elect to take it, as this does not interfere with the other beneficiary: *Seeley v. Jago* (1817), 1 P. Wms. 389.

The earlier authorities are collected in Lewin on Trusts, 11th ed., pp. 864, 1205, *et seq.*

In *In re Douglas and Powell's Contract*, [1902] 2 Ch. 296, it was held that there could not be an election to take in specie where a lunatic was concerned until a committee was appointed to represent him and had authority to assent on his behalf.

The most recent case, and that which resembles most closely the problem now presented is, *In re Marshall*, [1914] 1 Ch. 192. There the testator bequeathed, *inter alia*, a number of shares in a limited company to trustees, upon trust to convert, with power to retain without conversion so long as the trustees should deem proper. The residuary estate of which the shares in question formed part was to be divided among certain residuary legatees. In the events which had happened, a son and two grandsons had become absolutely entitled to certain shares of this residuary estate, and claimed to have transferred to them their proportion of the shares of the company. It was held that "in the absence of special circumstances the right of the absolute owners to have a transfer of their shares ought to prevail over the discretion of the trustees." Cozens-Hardy, M.R., thus states the law (pp. 199, 200): "Speaking generally, the right of a person, who is entitled indefeasibly in possession to an aliquot share of property, to have that share transferred to him is one which is plainly established by law. There is also another case which is equally plain and established by law, that where real estate is devised in trust for sale and to divide the proceeds between A., B., C., and D.—some of the shares being settled and some of them not—A. has no right to say 'Transfer to me my undivided fourth of the real estate because I would rather have it as real

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estate than personal estate.' The Court has long ago said that that is not right, because it is a matter of notoriety, of which the Court will take judicial notice, that an undivided share of real estate never fetches quite its proper proportion of the proceeds of sale of the entire estate; therefore, to allow an undivided share to be elected to be taken as real estate by one of the beneficiaries would be detrimental to the other beneficiaries. But that doctrine, it seems to me, has no application, apart from special circumstances, to personal property. It may apply to a case of a mortgage debt which you cannot conveniently split up into shares; but when you are dealing with the case of a limited company with ordinary and preference shares, you want to know a great deal more than that before you can say that the trustees are entitled to deprive an absolute owner of his right to claim a transfer. When the case was first before us we suggested that we should like to know what were the facts about the company; what was its capital, and the number of its shareholders, and what were the special circumstances of the case; and it stood over in order that we might have better information. That information has now been furnished very conveniently and satisfactorily, and it appears that this is not in any sense a private company in which the testator held a control by holding the majority of the shares, or anything of that kind. It is a case in which there are some 360 shareholders. The amount of the capital now represented by the testator's residuary estate is substantially one-sixth of the capital. The present appellants hold one-fifth of that amount, in regard to which they say to the trustees, 'Please transfer to us our one-fifth of the block of shares which you are now holding; in our opinion there is no reason whatever why you should be entitled so to hold them.' " Phillimore, L.J., points out that in certain cases the desirability of keeping a large block of stock together, so as to ensure solidity of voting power, might be a sound reason for refusing the applicant's request.

In this case, applying the principle which, I think, runs through all these cases, I think it is the duty of the trustee to refuse to transfer any portion of the stock to the beneficiaries, unless all agree. It is plain that if the widow and the son suc-

ceed in obtaining their one-half of the stock of the company now held by the administrator, this, together with the stock held or controlled by them, will give them the controlling vote in the company; and the fear of the daughter that she will be converted into a minority stockholder, instead of having a joint interest in the controlling stock, is well-founded. I do not mean to say that she has established in any way that the majority interest will be used in any sense unfairly; but her position will be changed without her consent. She will be given something other than that which she now has; and, as I understand the law, where the objection is one of substance, and not put forward manifestly unreasonably and vexatiously, it is the duty of the trustee to protect the dissentients, and the Court cannot relieve the trustee from the duty which has been imposed upon him by the statute—which here constitutes his trust instrument. The statute directs a sale and conversion; and, in the absence of consent, this must govern.

The question here raised and determined is not far removed from that which has arisen, but has not yet been determined, in *Rose v. Rose* (1914), 7 O.W.N. 416, 32 O.L.R. 481.

The administrator was well justified in asking the opinion of the Court; and costs of all parties may, therefore, be paid out of the estate.

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Municipal Corporation—Contract for Supply of Crushed Stone—Manufacture by Workmen outside of Municipal Limits—"Fair Wage" Clause—Powers of Corporation—Supervisory Jurisdiction of Court.

The Court has no jurisdiction to prevent a municipal corporation from making any contract with respect to a matter within its jurisdiction—no right to interfere with municipal action unless the corporation proposed to transcend the limits of the jurisdiction conferred upon it by the Legislature.

The purchase of stone for municipal purposes being *intra vires* of a municipal corporation, there is nothing *ultra vires* in introducing into a contract for the purchase of crushed limestone a clause providing that the contractor shall pay the workmen employed by him in the execution of the contract the union rate of wages prevailing at the date of the contract.

An action by a ratepayer and a company to restrain a city corporation from entering into a contract with any person other than the plaintiff

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company (who had tendered without the "fair wage" clause) for the purchase of crushed limestone, to be manufactured by labourers outside the city limits, and to restrain the corporation from inserting in any contract a "fair wage" clause, was dismissed.

Crown Tailoring Co. v. City of Toronto (1903), in the foot-note to this case, not followed.

Kelly v. City of Winnipeg (1898), 12 Man. R. 87, explained and approved.

MOTION by the plaintiffs for an interim injunction, turned by consent into a motion for judgment.

December 23, 1914. The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

I. F. Hellmuth, K.C., and *Eric N. Armour*, for the plaintiffs.

G. R. Geary, K.C., for the Corporation of the City of Toronto, the defendants.

January 2, 1915. MIDDLETON, J.:—The plaintiff Alfred Rogers is a ratepayer of the City of Toronto, and sues on behalf of himself and all other ratepayers to restrain the city corporation from entering into a contract with any person other than the plaintiff company for the purchase of crushed limestone, and for an injunction restraining the corporation from inserting in any contract or tender for contract, a clause commonly designated "the fair wage clause."

By by-law of the City of Toronto, passed in December, 1893, it is provided that every contract thereafter made with the city shall contain a clause providing that the contractor shall pay to all his mechanics, workmen, and labourers, to be employed by him in the execution of the contract, the union or prevailing rate of wages for such work—prevailing at the date of the contract. Thereafter resolutions were passed fixing a minimum wage, originally 18 cents—now 25 cents—per hour, and settling a general form of clause to be inserted in the contract.

In pursuance of this settled policy on the part of the municipal council, the form of tender supplied to competing contractors contains the clause indicated. The plaintiff company in sending its tender deleted this clause. Other tenderers submitted tenders in accordance with the requirements of the muni-

cipal council; and it is proposed by the council to contract with some one of those whose tenders accord with the view of the council.

It is argued that, because the stone which is to be contracted for will be manufactured by labourers outside of the municipality—there being no limestone quarry within the city—this amounts to a diversion of municipal funds to non-municipal purposes, namely, the increasing of wages of non-resident workers, and that this is an attempt on the part of the municipality to transcend the territorial limits of its jurisdiction; for, if it is attempted to justify the municipal action upon the ground that the clause was inserted to secure the well-being of the workers, the workers to be benefited reside beyond the limits of the municipality, and the general authority conferred upon the municipality is only to pass by-laws for the well-being of its inhabitants.

I think the action is entirely misconceived. The by-law is not the subject of attack, and I know of no principle which enables the Court to prevent a municipality from making any contract with respect to a matter within its jurisdiction which it may see fit to make. Undoubtedly, the purchase of stone for municipal purposes is *intra vires*; and, if the municipal council sees fit in its contract to stipulate that fair wages shall be paid to those who manufacture the stone, there is nothing in this that is *ultra vires* the corporation. The Courts have no right to interfere with municipal action unless the municipality proposes to transcend the limits of the jurisdiction conferred upon it by the Legislature.

At one time the Courts assumed jurisdiction to review municipal legislative action, upon the ground that the action was unreasonable. There never was in Ontario any real foundation for such jurisdiction. The supremacy of the municipal legislative authority within the sphere of its delegated jurisdiction was not at first recognised. It was assumed that the municipality occupied some subordinate position, and that the principles applicable to the determination of the validity of by-laws of companies, or the rules and regulations of boards exercising a delegated authority, could be applied to municipal action.

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This assumed supervisory and paternal jurisdiction of the Courts, although founded in error, became well established, and was only put an end to by the direct action of the Legislature, which enacted that no municipal by-law should be dealt with by the Courts on the ground of unreasonableness or assumed unreasonableness.

But this jurisdiction so usurped by the Courts over municipal legislative action was never extended to the supervision of contracts and the elimination of terms that might be regarded as unreasonable. The only case that lends colour to the suggestion of such a jurisdiction as this is an unreported decision of my Lord the Chancellor in a judgment in an action of *Crown Tailoring Co. v. City of Toronto* (1903), where an injunction was sought and granted restraining the letting of a contract for firemen's clothing, in which it was stipulated that each article must bear the label of the Journeymen Tailors' Union. This decision proceeded upon grounds that possibly justify the plaintiffs' contention, but it is entirely out of accord with the great bulk of the law upon the subject, which, I think, must govern me.*

*CROWN TAILORING CO. v. CITY OF TORONTO.

November 10, 1903. This action was tried by BOYD, C., without a jury, at Toronto.

A. C. McMaster, for the plaintiffs.

A. F. Lobb and W. C. Chisholm, for the defendants.

BOYD, C. (at the conclusion of the hearing):—This case has been very fully and ably argued by Mr. Lobb; and, if it involved the consideration of conflicting authorities, I should look more fully into it. Both counsel concede that there is nothing which covers the point, and it seems to me that is quite in accordance with what has been said. The cases cited, both from the United States, Manitoba, and also from British Columbia, do not touch the matters with which we are concerned here. If it were correct, as argued, that this was a matter of discretion, or of internal economical distribution of funds on the part of the corporation, I should entirely accede to Mr. Lobb's argument, that, unless some gross abuse were proved in the exercise of the powers, the Court would not interfere. It does not strike me, however, that this is a case of that character at all. This is a case which is to be judged of rather in the light of those authorities which deal with by-laws passed by a municipality where the matters concern the public. This action is not by Mr. Anderson, a contractor who wished to get rid of the objectionable contract, or to have his goods taken. It is by Mr. Anderson, the ratepayer, on behalf of himself and all others. And the broad question which comes before me is, whether an injunction already granted should be continued with respect to this clause in the contracts that are put forth for the tenders for the firemen's clothing, that is, that each article of clothing supplied shall bear the label of the Journey-

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With the wisdom or unwisdom of the council's action I have no concern. If the ratepayers agree with the policy of the municipal council, then all is well. If they disagree, the redress is at the polls, and not through the Courts.

In *Kelly v. City of Winnipeg* (1898), 12 Man. R. 87, where

men Tailors' Union. This is the objectionable point. In this contract there is a provision which was sanctioned by the Manitoba Courts as being a legitimate exercise of power, that is, that the minimum rate of wages as stipulated shall be 18 cents an hour (*Kelly v. City of Winnipeg*, 12 Man. R. 87). There is no minimum rate to be paid for each garment, expressed in this contract, though it has been in some of the others. That would probably be on the same footing as the 18 cents an hour, and under the authority of the Manitoba case that would be a legitimate restriction exercised by the municipality, not only to secure good work, but to see that the people were reasonably well paid for their work. That is a matter in the public interest. That is not a matter which is before me in this litigation. I have not to pass upon it at all. It does seem to me right enough to have that stipulation in, that there shall be living wages paid, and that the garments shall be up to a certain standard. There is no objection to the municipality providing that there shall be a certain standard of workmanship, or that there shall be a certain standard for payment, but that is not the point which comes before me in this particular case. The question is the label of the Journeymen Tailors' Union being a prerequisite before the contract can be effected. I am not concerned at present at all about how the amount is to be applied, or what is paid to these workmen. The evidence here is that the workmen have been paid more than 18 cents, or certainly as much as 18 cents, per hour, and have been paid more than \$4.75. It is said that that cannot be traced to the particular workmen. I am not concerned just now about that, because it is not one of the issues raised before me, and the employer was not prepared to explain where and how he was making his profit while tendering for the goods. The true way of securing what is wanted in this case seems to me to be what was done. That is, there was bad workmanship; then they insisted that the rate of wages should be increased, or a better rate should be paid per hour, a better rate should be paid per piece, and then a proper inspection after the work is done. That is the true way of securing a remedy; and, although one of the witnesses says that the employment of this term, the label of the Journeymen Tailors' Union, had a sort of magic operation, that all the work became immediately better after that, I cannot exactly give credit to that view of the case. You may have scamp work among journeymen tailors, as well as anywhere else. You may pay them good wages, and yet have improper and botched work. You may pay them good wages and yet have inefficient men doing the work. There is no magic result. The test is, pay men fairly, see that the work is done properly, and have proper inspection. There is no short and efficacious course for the municipality to adopt.

It seems to me that this stipulation in the contract is objectionable, on the same ground that it would be objectionable in a by-law—that is to say, it is an unreasonable condition. There is a want of equality and fairness in inserting that stipulation, on many grounds. First of all, there is a restriction at once imposed upon the area from which the skilled labour can be obtained. I do not deal with this particular man who is making the complaint, but in his case one can see how it operates. He has a large factory there, well-equipped, able to do all the work under that roof, able, as he says, by the employment of up-to-date machinery, expensive machinery, to do better work. I am not here to judge whether that is so or not. Mr. McGowan will have to look to that when he in-

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a similar clause was attacked, it was held "that the matter in dispute was a question of policy in the government of the city, as to the expediency of which the ratepayers, and not the Court, should pronounce." It is true that in the course of the judgment Mr. Justice Bain pointed out that the Corporation of the City of Winnipeg could not be said to have no interest in the wages paid to the inhabitants of that city; but that is not the gist of the judgment. The real significance of the decision is

spects the stitches and so on, as to whether it is better or not, but he says he is in a position to do better work and at a cheaper rate, and that the effect of his system is that there is more skill in the operators, and it can be done under the same roof.

One of the defences raised here upon which there has been a total failure of proof is that this label of the Journeymen's Union was inserted for sanitary purposes. That is an entire fiction. No evidence has been given upon it. The whole weight of the evidence is the other way. So far as sanitary purposes are concerned, the work is much better done in a factory which is open to public inspection than it could be by these journeymen tailors, who may take their work home to their own houses, which will not be up to the standard required by the inspection of factories. But this particular man has all this machinery, has these workmen, has his concern going, has expended large moneys in that, and he can do all the work under his own roof.

Now, he and all others in his condition, and any one else tendering, could not rely upon what staff of operators they might have on hand, but would have to cast around and see where they could get journeymen tailors, union people, to do the work. The evidence shews here that only about one-half or a little more than one-half of all the tailors in the city belong to this union, so that those men out of the union are cast out altogether; and, though it may be, as it is said in the evidence here, that if there is a scarcity of workmen the Journeymen Tailors' Union may sanction the employment of outsiders, why should employers of labour be subjected to that restriction of going to the labour union and asking whether they may employ other workmen? So at once there is a restriction, an unreasonable restriction, it seems to me, imposed in the area from which the skilled labour can be drawn.

Then, again, there is a restriction imposed upon the employer in regard to the rate of wages which he must pay. There is a minimum imposed here. I am not talking about that, but these labour unions have it in their hands to control the rate of wages; and, while 18 cents may be the minimum which the corporation requires, it is in the power of this labour union to raise that scale, and to impose more, and to raise it during the progress of the work. It is in evidence already that there are three scales of wages for work done in three different streets in the city. I do not know anything more about the labour organisation, what means they have of letting people in or out, or making their arrangements; but this much at least appears, that there are three scales of wages for different streets, and that the factory of these plaintiffs is not in any of those streets, so that they do not know, and no one knows—I do not know and there has been no evidence given on the point—what they should have to pay to get work done, their factory being in Wellington street. So that there is a hampering of the employer. Then at once it gives a preference, a privilege or priority, to those who are union workers. They may not be as good workers as outsiders; the plaintiffs may get better labour or better assistance from those who are not in the union; but under this the union workmen have priority,

the statement I have quoted, that this matter is one entirely outside the jurisdiction of the Courts.

American cases afford no guide. The municipal system there differs widely from our own, and in most of the cases it will be found on examination that the decision in reality turns upon constitutional limitations to which we have no parallel.

People ex rel. Rodgers v. Coler (1901), 166 N.Y. 1, cited by Mr. Hellmuth, is a good illustration of the difficulty that arises

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they have the prior right, and it is only when there is any shortage perhaps that the plaintiffs can go outside.

Now, that is all wrong in the public point of view. The test of a man's capacity should be whether or not he is a good workman, whether he has skill; and the employer should certainly be free to go where he can get the best work, giving good pay for it; but this gives the privilege to the union man at the expense perhaps of more competent workmen who are outside of it.

Then, again, one cannot help seeing that this is an attempt, veiled it may be, but still an attempt, to set up the virtue of hand-labour against the beneficial employment of machinery where parts of the garments are made by that means. It is said by some of the witnesses called here that this hand-work is very much better done than machine-work. Well, that is one of the questions that was discussed long ago at the beginning of last century, when machines were brought into operation, and when the operations in the harvest-field were effected by machinery instead of hand-work. There was a rebellion, an uproar and cry, just in the same direction, that those machines would undo the poor. It has turned out that those are the greatest benefits the poor could have, they have bettered the condition of the working classes, and this is a phase of the same struggle, that the men who are working by hand are going to be interfered with, and the city council apparently has been trying to give effect to that by introducing this direction, that the label of the Journeymen Tailors' Union, where the men only work by hand, shall be a prerequisite, so that the machinery by which the operations are done quickly, and more certainly, and it is said more effectually, are cut out. It is impossible to say, upon this evidence, that the work done by these particular plaintiffs is inferior at all to the best hand-work that has been done. Machine seaming, sewing and stitching, is employed by both of them at certain stages, and all the advantages which are claimed by the hand-workers, as to fitting and shaping, and the canvass, and all this kind of thing. These burly firemen all look very well dressed, and I have no doubt that, when they have their garments fitted on, they will see that proper fits are given to them just as well by Mr. Anderson as any other person. The work turned out will probably be as well done by the employment of machinery, although the men are not Journeymen Tailors' Union men. I do not take any stock, to use a familiar expression, in that argument, that better workmanship can be secured. The evidence fails entirely to prove that.

Then, again, there is the other evidence which has been given, that the only distinction, so far as I can see, between what is claimed on the part of the city, representing the working people, or representing the Journeymen Tailors' Union, is, that the plaintiffs' work is done in detachments, that is to say, one part of a garment is made by one person, who makes all of that part, and the other parts are made by another set of workmen, instead of the whole garment and the whole suit being made by one hand. One man does the whole in the one case of the Journeymen Tailors' Union—that is, in theory, but it is not practically so, because the work is turned

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when any attempt is made to apply American cases to the situation in Ontario. There a statute, and not a contract, was the subject of discussion. The statute was found to be invalid because "some of its most material provisions are in conflict with the constitution."

The actions fails, and must be dismissed with costs.

over to female workers. One hand may superintend it. Well, that is a contest rather between the plaintiffs' work and some one else's. That is a matter that Mr. McGowan will have to look to when the results come to him; but, upon this evidence, better results may be expected from the plaintiffs' way of doing things than the other. The evidence is, that these women or men who are working on the parts of the garment become more skilful, they have greater experience in that particular way, and the result may be expected to be better than if one man does the whole. That is a matter of dispute. I do not know whether that is so or not, but that is really the only distinction there seems to be between the Journeymen Tailors' case and the plaintiffs' workmen. That is all beside the question, as to whether it is right to have the restriction put upon all people tendering, that they must have their work done by the Journeymen Tailors' Union. It touches upon the sanitary question.

I can see no reason for disagreeing with Mr. Fullerton's advice given to the council, not this year, but some time ago. It is said that another complaint had been made about this before. They called for Mr. Fullerton's opinion some time ago—I do not know how long ago—but he gave them the same opinion he does now, a considered opinion, that this was an undue restriction which it was not possible for the city council to carry out. I think he advised the city rightly, and they will not be surprised if I affirm his opinion in this action, and grant the injunction, or continue the injunction, with costs.

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[MEREDITH, C.J.C.P.]

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WOLSELY TOOL AND MOTOR CAR CO. v. JACKSON POTTS & CO.

Principal and Agent—Customs Broker—Breach of Duty—Depriving Principal of Control over Goods—Negligently Entrusting Sub-agent with Bill of Lading Endorsed in Blank—Misdelivery of Goods—Negligence of Sub-agent and of Carriers—Third Parties—Liability over—Damages—Costs.

A motor carriage made and owned by the plaintiffs was shipped by them from their factory in England to themselves or their assigns at Vancouver, British Columbia; and the usual bill of lading, in two parts, was obtained by them from the carriers, and sent, with the usual invoices, to their Canadian sales branch at Toronto, Ontario. The bill of lading provided, in the usual form, for the carriage of the goods to the plaintiffs or their assigns at Vancouver—the through charges being in effect prepaid. The motor carriage was intended by the plaintiffs to be delivered to H. at Vancouver, upon payment by him of the price of it, in accordance with an agreement between them; and they drew, at sight, upon H. for the price of the carriage, endorsed one part of the bill of lading in blank, attached the bill of exchange to it, and sent the

two to their bankers in Vancouver, with instructions to deliver the bill of lading so endorsed to H., upon payment by him of the amount of the bill of exchange. But, before any one could rightly obtain possession of the goods, it was necessary that they should be cleared at the Customs House. The work of making all entries and clearing all goods, everywhere in Canada, for the plaintiffs, was entrusted to the defendants, who were Customs brokers at Toronto; and, for the purpose of making this entry, the invoices, and the other part of the bill of lading, endorsed in blank, were delivered by the plaintiffs to the defendants, with a cheque for the amount of money required to pay all charges, and the defendants undertook to do the necessary work in clearing the goods from all Customs demands. All the papers in regard to this entry were made out and signed and sworn to in Toronto, by one of the defendants, who had a power of attorney from the plaintiffs. When completed, the papers were sent, with the cheque for the amount required to pass the goods, to the defendants' correspondents in Vancouver—Customs brokers there—to clear the goods; and that was done by them, they retaining the second part of the bill of lading. By some means, this second part got into the hands of the carriers at Vancouver, and H. got the motor carriage from the carriers without having paid the price or any part of it. The plaintiffs sued the defendants for the value of the motor carriage; and the defendants, besides contesting the claim, brought in the Vancouver brokers and the carriers as third parties, and claimed over against them:—

Held, that the defendants were guilty of a gross breach of their contract with the plaintiffs, to perform only the duty of the plaintiffs' Customs brokers, in sending the bill of lading endorsed in blank to the Vancouver brokers; that, standing alone, was an act of negligence, and the more so because the defendants knew all the facts, and did not warn their correspondents at Vancouver, nor even call attention to the fact that the part of the bill sent was, endorsed in blank, a dangerous instrument; and it was not a sufficient answer to this charge of negligence to say that the plaintiffs should not have given to the defendants the bill so endorsed; nor to say that no harm would have come from the defendants' negligence if others had not been negligent too.

2. That, upon the evidence, the Vancouver brokers were not brokers of the plaintiffs, but were acting for the defendants.
3. That the defendants must pay the amount of the plaintiffs' actual loss, namely, the price which H. was to have paid for the motor carriage, and what the plaintiffs lost by being deprived of both carriage and price from the time of the wrongful delivery until judgment; those damages being fixed at the same amount and interest upon the price at five per cent. per annum during that time—with costs.
4. That the Vancouver brokers, third parties, were guilty of a breach of their duty to the defendants, who employed them and paid them for their services, and were liable to make good to the defendants the amount recovered by the plaintiffs.
5. That, upon the evidence, the carriers had not—the onus being upon them—proved that they delivered the motor carriage to H. upon the faith of the bill of lading, endorsed in blank, produced and given to them by him as the lawful holder of it; nor had they shewn any other proper discharge of all their duties as carriers of it; they were, therefore, liable for a misdelivery of the carriage; and damages should be assessed against them at the same amount.
6. The question whether the bill of lading, endorsed in blank as it was, was a sufficient authority to the carriers for the delivery by them, in good faith, of the goods, to the bearer of it, was not considered; but it was pointed out that, under the bill, the goods were to be forwarded, not to the plaintiffs or their order, but to the plaintiffs or their assigns only; and that the bill also provided for its being given up, duly endorsed, "in exchange for delivery order."
7. That any claim the plaintiffs might make against the railway company

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for the misdelivery of the goods should be precluded by the judgment between the parties to the third party proceedings, and that the damages recovered in such proceedings should be paid and applied in satisfaction of the plaintiffs' judgment against the defendants.
 S. That there should be no order as to the costs of the third party proceedings.

ACTION for damages for the loss of a motor car shipped to the plaintiffs at Vancouver, British Columbia.

December, 1914. The action was tried by MEREDITH, C.J. C.P., without a jury, at Toronto.

A. McLean Macdonell, K.C., and J. W. Bain, K.C., for the plaintiffs.

W. N. Tilley and J. J. Maclellan, for the defendants.

A. Haydon, for the third parties the Great Northern Railway Company.

No one appeared for the other third parties.

January 4, 1915. MEREDITH, C.J.C.P.:—The substantial questions involved in this case are all questions of fact; and questions which, with one exception, are easily answered; the material facts being, with that one exception, easily found: see *Heys v. Tindall* (1861), 1 B. & S. 296.

The plaintiffs, admittedly, through the fault of one or more of the parties to this action, have been deprived of their control over the goods in question; and are entitled to recover damages for the loss which that deprivation has caused them.

The goods in question—a motor carriage—made and owned by them, were shipped by them from their factory in England to themselves or their assigns at the city of Vancouver, in British Columbia, Canada: and the usual bill of lading, in two parts, was obtained by them from the carriers, and sent, with the usual invoices, to their Canadian sales branch or agency at the city of Toronto, in Ontario, Canada.

The bill of lading provided, in the usual form, for the carriage of the goods to the plaintiffs, or their assigns, at Vancouver, the carriers to pay the freight; that is, the through charges were in effect prepaid.

The motor carriage was intended by the plaintiffs to be delivered to one Noel Humphreys, at Vancouver, upon payment

by him of the price of it, in accordance with an agreement respecting it made between them: and, again in accordance with the plaintiffs' method of doing business of that kind there, they drew, at sight, upon Humphreys for the price of the carriage, endorsed one part of the bill of lading in blank, attached the bill of exchange to it, and sent the two to their bankers in Vancouver, with instructions to deliver the bill of lading so endorsed to Humphreys, upon payment by him of the amount of the bill of exchange, which was the price of the carriage; all of which was in accord with their usual, as well as with common, mercantile methods: possessed of the bill of lading so endorsed, and having paid the price of the carriage to a bank of the highest standing, Humphreys would, and it was meant that he should, have no trouble in getting delivery to him of it.

But, before any one could rightly obtain possession of the goods, it was necessary that they should be "cleared" at the Customs House, having "come through in bond:" and the work of making all entries and clearing all goods, everywhere in Canada, for the plaintiffs, was entrusted to the defendants: and, for the purpose of making this entry, the invoices, and the other part of the bill of lading, were delivered to the senior partner of the defendants, with a cheque for the amount of money required to pay all charges, and the defendants undertook to do the necessary work in clearing the goods from all Customs demands.

When the plaintiffs first opened their sales branch or agency in Toronto, the senior partner of the defendants, who are Customs brokers, sought and obtained from the defendants all of their Customs House work, and has ever since had, and done, it.

The second part of the bill of lading was given to the defendants with the invoices, because the senior partner of the defendants had told the plaintiffs that it was necessary that it should accompany the papers, that the Customs House officers required its production; and so it was always given with the invoices to the defendants, sometimes endorsed in blank, and sometimes not so endorsed. The fact is that sometimes Customs officers require the production of the bill of lading and sometimes they do not; their purpose being to prevent frauds; to prevent

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the passing of goods as shipped in England, when in truth they are shipped from some foreign country, and so are liable to a higher duty than if they had come directly from some part of Great Britain, although of British make. So that in dealing with a company as well known as the plaintiffs it might be seldom, if at all, that the bill of lading would be asked for: yet it was not unreasonable for the defendants to ask for and have it so that it might be produced if demanded.

All the papers in regard to this entry, as was also the case with all work done by the defendants for the plaintiffs, were made out and signed and sworn to in Toronto, by the defendants' senior partner, he, or his firm, having a formal power of attorney from the plaintiffs to act as their brokers. When completed, the papers were sent, with the cheque for the amount required to pass the goods, to the defendants' correspondents in Vancouver, the third parties the Turnbolls, who are Customs brokers there, to clear the goods from all Customs charges: and that was done, they apparently retaining the second part of the bill of lading.

So far it is quite plain sailing, but the subsequent facts are in some respects ill-disclosed. That their part of the bill of lading by some means got into the hands of the carriers at Vancouver, the third party railway company, and that Humphreys got from them the goods without having paid a farthing on their price, is very plain: how the bill of lading got into the hands of the railway company, as well as just by what means and how Humphreys so got possession of the goods, is not made plain by the testimony.

In these circumstances, the plaintiffs sue the defendants for the value of the motor carriage: and the defendants, besides contesting the claim, make a claim over against the third parties, the Turnbolls and the carriers, the railway company.

The defence set up to the plaintiffs' claim is, that the defendants themselves were not guilty of any error; and that, if the Turnbolls were, the defendants are not answerable for it; that the Turnbolls were not the defendants' agents, but were the plaintiffs': but in both respects I find them to be clearly wrong.

I find the defendants guilty of a gross breach of their con-

tract with the plaintiffs, to perform duly the duty of the plaintiffs' Customs brokers. Such brokers are employed because of their professed knowledge, skill, and care in the performance of such duties as the defendants undertook in this case. To send, without the least need, indeed without the least excuse for it, a bill of lading of goods of the value of several thousands of dollars, to send such a bill endorsed in blank, with a full knowledge of the danger of so doing, a knowledge which every business man must possess, not to mention those who hold themselves out as competent Customs brokers, I find to have been an undoubted act of negligence, standing alone, and one which becomes the more culpable in view of the fact that the broker who is personally answerable knew at the time that the other part of the bill of lading was to be sent with bill of exchange attached, as I have before mentioned, to guard against delivery of the goods until the price had been paid; and also of the fact that in forwarding the papers to the Turnbulls, and in giving them instructions regarding the entry, not a word was said in the way of warning, either regarding the bills at the bank, the means they adopted of preventing delivery before payment, or even calling attention to the fact that the part of the bill of lading sent to them was a dangerous instrument, being endorsed in blank.

It is not a sufficient answer to this charge of negligence to say that the plaintiffs should not have given to the defendants the bill so endorsed. The defendants were not paying the plaintiffs for skilled reasonable care in the performance of the plaintiffs' professional duties: the plaintiffs were paying the defendants for all that. The plaintiffs owed no duty to the defendants to know that an endorsed bill of lading was not necessary for Customs purposes; the defendants owed that duty to the plaintiffs; and they owed the duty to the plaintiffs also to inform them of the fact and let the danger be removed by them: or else to have removed it themselves by running a pen mark through the endorsement, or otherwise cancelled it. And, after all that, there was the gross neglect to warn the Turnbulls; a neglect which, whatever else may be said against them, gave them some ground for the complaint they make in this respect, in their letter of the

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24th June, 1913, to the defendants: see *Rudd Paper Box Co. v. Rice* (1912), 3 O.W.N. 534.

Nor is it a sufficient answer to this charge of failure to do that which they were paid for doing and had contracted to do, for the defendants to say that, any way, no harm would have come from their negligence if others had not been negligent too. The person who wrongfully sets the squib going is answerable for all that may reasonably be expected as a possible result; and the person who sends on a loaded, capped, and full-cocked gun, and especially one who is a professed armourer for hire, can hardly escape being answerable for what might reasonably have been anticipated, if he does not take the trouble to put the dangerous weapon at least at "safe."

Upon the other question, I find that the Turnbulls were not brokers of the plaintiffs, but were acting for the defendants, in doing the few purely ministerial acts which the defendants employed them to do. The Turnbulls had no power of attorney, nor any authority to act in any manner as the plaintiffs' brokers: indeed all that they had to do were not only purely ministerial acts, but were acts of that character so restricted that they had no power over the money to be paid as Customs duties; a cheque payable to the Collector of Customs was the means by which payment was made. The Turnbulls had no more power, and did no more, than any porter or messenger might have done. It is no gain to say, "But they were skilled brokers, and so their knowledge might have been useful if any difficulty had arisen," for that contention vanishes when it is again stated that all the papers were prepared by Jackson over his signature and under his oath, taken in Toronto, so that no change could be made, not even to the dotting of an i or the crossing of a t, without the papers being sent back to Toronto; nor could they supplement them, because Jackson alone had a power of attorney.

But it is urged, for the defendants, that there was an expressed arrangement, between Jackson and the manager of the plaintiffs' branch or agency at Toronto, under which the Turnbulls were to become the plaintiffs' Customs brokers at Vancouver: that contention however fails for two reasons: because it is

not proved; and, if it had been, no such arrangement was ever carried into effect; no such appointment was expressly made, nor were the Turnbolls ever employed except by the defendants in their own name to do for them the purely ministerial acts I have mentioned. There was a conversation between the plaintiffs' manager at Toronto and Jackson, in which, among other things said respecting Jackson's appointment and work, it was mentioned that out of Toronto work could not be altogether done in Toronto, that the entry must be made at the port of discharge, and that the plaintiffs could have a broker there to do all the work, or else it could be done in the way in which I have mentioned as it having been done; and in that conversation Jackson mentioned the Turnbolls as competent and trustworthy brokers, and the plaintiffs' manager was satisfied with Jackson's recommendation of them and willing that they should do anything that might be needful in clearing the plaintiffs' goods at Vancouver, as he would have been with anything else in reason that Jackson might have said, upon the subject of Customs House clearances; but, giving the fullest weight to all that was said, it fell far short if any appointment by the plaintiffs of the Turnbolls to act for them, or any authority to Jackson to make any such appointment: and, as I have said, none in fact was ever made. It is not uncommon for one seeking business, and especially the whole business in his line, of a large concern like the plaintiffs', to speak of his facilities and agencies and to commend them, in order to make a good impression by shewing his capabilities for the best kind of performance of the business entrusted to him. There is no suggestion that any such appointment was ever actually made, or the Turnbolls ever communicated with on the subject, or of any kind of acceptance by them of it or of any kind of contract with the plaintiffs, or any direct responsibility to them. In so far as the testimony of Jackson differs from that of any other witness on this subject, I place more reliance on the testimony of the other witnesses; not because, on the part of any of them, there was any kind of attempt, or desire, to mislead justice; but because it was so very evident that Jackson was so oppressed by the danger of losing his case, which would be a very serious thing for him, whilst one far less oppres-

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sive to the plaintiffs, that it was difficult for him to say or to think anything that was not favourable to him, quite unconscious, I have no doubt, of having given even an excessive colour to any of his views. So I find this defence not proved; but, if it had been, the defendants would still remain liable because of their own negligence; quite apart from that of the Turnbulls.

In order that the plaintiffs may recover all their loss from the defendants, it is not necessary for the plaintiffs to shew that the defendants' negligence was the cause of a rightful delivery of the goods to a wrong person. The defendants were guilty of a breach of their contract with the plaintiffs, and without that breach of contract there would not have been such misdelivery: it was the one thing to be guarded against, just as if it had been a cheque endorsed in blank, with of course this difference, in favour of justice, in this case: the money mispaid on the cheque could at once be put in the wrongdoer's pocket, and a legal right to it transferred by the wrongdoer, and it would be a long way following it up and recovering it, if it ever could be, if once in the wrongdoer's possession: the motor carriage could not immediately be so dealt with: and it does not lie in the defendants' mouth to say to the plaintiffs: "The carriage is in law still yours; go and get it:" that was the defendants' duty if any one's: and, having failed in that, as well as in their obligation to take reasonable care of the "loaded gun," they must pay the amount of the plaintiffs' actual loss; which is the price that Humphreys was to have paid for the carriage, and, in addition, the loss through being deprived of both carriage and price from the time of the wrongful delivery of it until the entry of judgment in this action; and those damages I fix at the same amount and interest upon the price at five per centum per annum during that time. The judgment clerk can, and is to, add these two amounts together and enter judgment for the plaintiffs against the defendants and damages in the amount of them in one sum; with costs.

The third parties the Turnbulls are liable to make good to the defendants that sum: they were plainly guilty of a breach of their duty to the defendants, who employed them and paid them for their services. They had no authority from the de-

fendants, or right of any kind, to make any use of the bill of lading, sent by the defendants to them, except in the Customs House, and for the purpose of clearing the goods. They may have a very good "moral" ground of complaint against the defendants for not making the bill of lading "safe" before sending it to them, or at least for not warning them of its dangerous condition: but that does not excuse them from the wrong of making an unauthorised use of it, whether they observed, or ought to have observed, the endorsement in blank, or not. If they gave the bill of lading to Humphreys, it was a flagrant breach of duty; if they only lent it to the railway company, at the company's request, to enable the company to "fix freight charges," they did it at their own risk, and must take the consequences. As I have said, on the first branch of the case, it is also no answer to the defendants' claim to say: no property in the goods has yet passed; you or the plaintiffs can go and get the carriage yet.

And now we reach the misty ground: and have that obstruction to view in the way, chiefly, I have no doubt, because all the testimony on this branch of the case was taken on a commission in British Columbia, and taken apparently with a misty notion only of the purpose for which it should have been taken; with absurd objections, and "refusals to answer under the advice of counsel," interspersed, tamely submitted to. However, after giving the whole evidence the best consideration I could, and naturally relying much upon the indisputable circumstances of the case, my conclusion is: that the railway company have not proved that they delivered the carriage to Humphreys upon the faith of the bill of lading, endorsed in blank—to which I have before frequently referred—produced, and given to them, by him as the lawful holder of it: nor have they shewn any other proper discharge of all their duties as carriers of it for hire.

The onus of proof of a valid delivery of the goods is upon these third parties, the railway company; and, for the purpose of discharging that onus, they rely mainly upon that part of the bill of lading which was entrusted to the brokers by the plaintiffs, supported by the testimony of their witness Burton, who describes himself as the company's "revising clerk" at

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Vancouver, and his duty as revising the weight and charges on the waybills of freight coming in. His story is, that Humphreys brought the bill of lading to him; and that, after making several inquiries, and getting the undertaking from him, endorsed by his bankers, to pay any charges there might be, if any, on the shipment, and "being firmly convinced that Mr. Humphreys was acting as agent for the Wolsely Tool and Motor Car Company, which he represented to be," he gave the usual instructions for the delivery of the carriage to him, and that it was, accordingly, delivered to him.

To the contrary, Humphreys testified that he did not bring the bill of lading to the railway company: that in fact he really never had it in his possession: that he "did not handle it himself:" that he understood that it was sent from the Turnbulls' office to the office of the railway company by a messenger; that "they said they would send it down by a messenger."

I am unable to place much dependence on the testimony of either of these witnesses, and so seek eagerly for circumstances to support, or the opposite, any material statement made by either of them. Humphreys is so condemned in the transactions that it may perhaps make little difference to him whether the truth is told or not; however it came about, the substantial result is the same—he got, without payment of a farthing, this valuable carriage, to which he had no right except on payment of \$3,359: yet one might expect him to wish to put the best face possible upon his act; and not to be over-scrupulous in doing so. Whilst Burton's intent in making the best of it for himself is very evident; and it may be, and probably is, a more substantial interest than Humphreys': and these things happened over a year and a half ago—a year and a half before the time when the evidence was given; and, no doubt, but one of many thousand like transactions that took place in that time. Against his story, and in favour of Humphreys', is the fact that he—Burton—had in writing asked the Turnbulls for the bill of lading to enable him "to fix" the freight charges: and it is quite plain, from his own testimony, as well as from some indisputable facts, that this fixing of the charges was what had the most prominent part in the witness's thoughts and

actions: if they were not made safe, if anything was lost, he would be looked to by the company to make it good. For some reason or other, not made very plain, although the ship-owners were, and the shippers were not, to pay freight, there was some reason why the railway company should make quite sure of all that was coming to them before letting the goods pass out of their possession; and so it is not altogether improbable that the "revising clerk" was penny wise and pound foolish in the face of the present danger of having to pay the penny himself, the danger regarding the pound being much more remote; as I dare say there are many thousands of transactions of the like kind in good faith, and regular, to one where there is an attempt to obtain goods by false pretences. The fact of the railway company's written request seems to me to support, or at all events, lend some colour to, Humphreys' testimony as to how the bill of lading came to the company's office. It would be more in accordance with what might be expected that the Turnbulls would refuse to give the bill to him, but would send it to the company in answer to its written request; and would have sent it when and as Humphreys says it was sent, if he had said that the company wanted it, a thing he was very likely to do, not being able to get it himself; and each of the Turnbulls denies giving, or authorising the giving of, the bill to Humphreys.

The testimony of the witness Robertson throws no light upon the subject; his statement, to the witness Burton, that the goods could not be delivered until the company had the bill of lading, was of course made before the bill had come, though after it had been asked for by the company, and affords no assistance in solving the question, by what means did the bill come into the hands of the company?

Upon this branch of the case, the railway company have not proved their defence; indeed, my findings upon it must be: that the order for the delivery of the goods to Humphreys was made by the witness Burton because he believed him to be the agent of the plaintiffs, and as such entitled to it; and because he had, as he thought, been safeguarded against any personal loss on account of freight charges; and not because Humphreys brought to him the bill of lading—and under it, or upon giving it up,

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he was lawfully entitled to possession of the goods. Burton was not free from want of reasonable care; he had telephoned to the Turnbells and to another Customs broker, and had received such answers from them as would have put a reasonably careful man to further inquiry. He knew that he had written to the Turnbells for the bill of lading; and yet, in the face of all these things, he did not take the pains to find out from them, even by telephone, anything more about Humphreys or any right he might have to the goods. He was quite mistaken also in his notion that the Bank of Ottawa had "endorsed" Humphreys' undertaking as to the freight charges—the bank did nothing but "identify" the signature of Humphreys.

I find, therefore, that the third parties the railway company are liable for a misdelivery of the carriage; and I assess the damages against them at the same amount, made up in the same way, as I have assessed them against the defendants.

There are yet three things that I must refer to, in addition to the subject of costs, before my duty in the trial of this action is finished.

First: it must be made plain that throughout this action, until the present moment, it has been taken for granted by every party that the bill of lading, endorsed in blank as it was, would be a sufficient authority to the carriers for the delivery by them, in good faith, of the goods, to the bearer of it. I have therefore not considered the subject, because, quite apart from any effect the bill might, in any circumstances, have upon the property in the goods, any sort of order or authorisation, for any such delivery, as the parties might have, expressly or tacitly, agreed upon, would be sufficient between them. But I may point out that, under the bill, the goods are to be forwarded, not to the plaintiffs or their order, but to the plaintiffs or their assigns only: and that one of its provisions is in these words: "This bill of lading, duly endorsed, to be given up in exchange for delivery order." In the case of *Glyn Mills Currie & Co. v. East and West India Dock Co.* (1882), 7 App. Cas. 591, the delivery was to the consignees themselves.

Second: in like manner it has been taken for granted that the third party proceedings are regular and proper, and that, upon

the findings I have made, the defendants are entitled to judgment against the railway company, as well as against the other third parties; that they had and have a right to do if they choose; and, seeing that it is a convenient and comprehensive way of settling all the questions that have been discussed, I follow them in it, with this provision, added so as to make my findings apply to and safeguard all interests: that it shall be adjudged that any claim the plaintiffs might make against the railway company for the misdelivery of the goods shall be precluded by the judgment between the parties to the third party proceedings herein, and that the damages recovered in such proceedings shall be paid and applied in satisfaction of the plaintiffs' judgment against the defendants.

Third: throughout this trial, and until this day, I was not aware that the Great Northern Railway Company were parties to this action; my impression was, that the Canadian Northern Railway Company only were. The fact that Vancouver is in Canada, and a centre for all the great Candian transcontinental railways; and owing to the widespread loose fashion, which has invaded the Courts and worn down old-fashioned disdain of it, of calling nearly all companies by a nickname made up of some or all of the initial letters of the words composing the company's name, and pronouncing them in a slurred manner; and the fact that this fashion was followed during this trial, and the true name of the company not once used, and that slurred "G.N.R." and slurred "C.N.R." to ear, and indeed to the eye, are not strikingly unlike, is my excuse, good or bad, for that impression. I had, and have, an infinitesimal interest in the profits and losses of the first named railway company, and so consider myself disqualified from trying the question of that company's liability, unless, with full knowledge of the circumstances, the other parties to that branch of the action consent. If they all do, judgment may go as I have indicated; otherwise there will be no judgment upon that branch of the case; or, if the defendants so elect, their claim against the railway company will be dismissed without costs, and without prejudice to any other action any of the parties may see fit to bring in respect of such or a like claim, which will perhaps enable them to sue jointly with the plaintiffs

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and give all parties the benefit of a trial before a tribunal quite free from any partiality by reason of interest; and otherwise conclusive.

There will be no order as to costs of the third party proceedings in any case. All parties have been negligent; negligence and loose methods are common enough; to let those who are guilty of them succeed, or let them off, just as if they had been ever so careful and methodical, would be an improper encouragement in misdoing, which ought rather to be punished.

No judgment is to be entered upon any of my findings until after the lapse of thirty days; so that all parties may have abundant time to consider whether they shall appeal against them; or what other course is likely to be most in their interests.

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[IN CHAMBERS.]

RE ADKINS INFANTS.

Infants—Maintenance out of Funds in Hands of Guardian—Encroachment upon Capital—Power of Court—Infants Act, R.S.O. 1914, ch. 153, sec. 31(2)—Practice — Application at Chambers upon Originating Notice—Order Authorising Payment of Moneys to Mother of Infants.

The Court has power to enforce the duty of any guardian or other trustee to maintain and educate infant children according to their needs and means; and has power over the person and property of an infant, which power ought to be freely exercised for the benefit of the infant whenever necessary.

An order was made by a Judge in Chambers, upon the application of the mother of two infants (girls), who resided with her, authorising the guardians of the infants to pay to the applicant, out of the infants' moneys in their hands—largely out of the corpus, the income being insufficient—the same allowance for the infants' maintenance and education that had been paid for a limited time under a previous order, so long as past conditions as to maintenance and education should continue, up to the time of each infant, respectively, attaining the age of 21 years or marrying.

Re Carnahan (1912), 4 O.W.N. 115, where a doubt was expressed as to the practice in regard to orders for the maintenance of infants, considered.

It was *held*, that the application was regularly made at Chambers, by way of originating notice of motion; and equally so whether the guardians were assenting or dissenting—there being no question involved respecting the power of the Court, or the right of the infants to the property in question: the *Infants Act*, R.S.O. 1914, ch. 153, sec. 31 (2).

MOTION by the mother of the infants for an order authorising the guardians to continue an allowance to the applicant out of the infants' money for their education and maintenance.

December 19, 1914. The application was heard by MEREDITH, C.J.C.P., as in Chambers, at the London Weekly Court.

F. P. Betts, K.C., for the applicant and the guardians.

W. R. Meredith, for the Official Guardian.

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January 12, 1915. MEREDITH, C.J.C.P.:—In substance this is an application, on the part of all concerned, for maintenance and education of infant children largely out of the corpus of property belonging to them, the income of it being quite insufficient.

In form the application is: by notice of motion, to a Judge at Chambers, on behalf of the mother of the infants; with whom they live, for an order that the guardians of the property of the infants, such guardians being also administrators of the property of the father of the infants, who died intestate, shall pay to the applicant a sufficient sum for such maintenance and education.

So that really that which is sought is authorisation by the Court of payment out of the corpus.

The case is one of the simplest character, involving only elementary questions on the subject of maintenance; and it is made the more simple because already the matter has been dealt with, by a Judge of this Court at Chambers, and an order made directing such payments: but an order which covered only a limited number of years, and they have passed; and so the need for this second application.

It does not, of course, follow that, because an order was made before, another should be made now. Circumstances may have changed so as to require a refusal of this application, or the making of some order different from the order which was made: it was just because of this that that order was limited as to the time during which it should be effective. Yet in regard to any matter in which the circumstances are not changed—in which the principle involved is the same—I would feel bound by the former rulings, whatever might be my own view of any question covered by them, notwithstanding the case of *In re Hambrough's Estate*, [1909] 2 Ch. 620, decided in England, where there is not, as far as I am aware, any such legislation as that upon the subject contained in the Judicature Act of this Province.

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Therefore, having no doubt of the regularity of the application or of the propriety of making such an order as would give effect to the wishes of all parties to it, an order which would be quite in accordance with the settled practice of this Court, I should not have had any hesitation in making it, but for the doubt, thrown upon that practice, in the case of *Re Carnahan* (1912), a brief report of which appears in 4 O.W.N. 115: a doubt which I am quite sure was not expressed until after a very careful and anxious consideration of the subject and examination of the cases bearing upon it: an expression of doubt which called for hesitation, in this application, in order to obtain a fuller knowledge of the reasons upon which it was based, and to reconsider carefully the subject, with a view to a reference of the matter to a Divisional Court, under the legislation before mentioned—the Judicature Act, R.S.O. 1914, ch. 56, sec. 32—should I be able then to share in that doubt.

But further consideration prevents me sharing in it; and convinces me that the practice is right and should be followed, as indeed it was in *Re Carnahan*.

The power of this Court to enforce the duty, of any guardian or other trustee, to maintain and educate infant children according to their needs and means, is one of those elementary things about which there can be as little doubt as there can be of the fact that infant children ought to be maintained and educated according to their needs and means. Nor can there be any doubt of the wide power of this Court over the person and property of an infant; nor that that power ought to be freely exercised for the benefit of the infant, whenever necessary: see Simpson on Infants, 3rd ed., pp. 222-3.

Some stress seems to have been put upon the fact that the infants' money was not, in the case of *Re Carnahan*, as also it is not in this case, in Court: but I quite fail to perceive any substantial difference, in principle, that that can make. If infants are not lawfully entitled to have it applied for their maintenance and education, the Court should no more direct its misappropriation to that purpose in the one case than the other. If lawful and right that it should be so applied, the Court should enforce such an application of it by others just as well as to apply it if in its own hands.

Neither exercising the power of *parens patriæ*, nor otherwise, has the Court power to dispense infants' property as if its own: it has no power to be bountiful; it has power to give effect to legal and equitable rights only.

So, too, it is manifest that this application is regularly made at Chambers, by way of originating notice of motion: and that would be equally so whether the guardians were assenting or dissenting: there being no question involved respecting the power of the Court, or the right of the infants to the property in question. The statute so expressly provides: the Infants Act, R.S.O. 1914, ch. 153, sec. 31(2). Actions for maintenance went out of vogue, very properly, many years ago: see *Ex p. Starkie* (1830), 3 Sim. 339, and *In re Christie* (1840), 9 Sim. 643.

Where, as in the case of *In re Lofthouse* (1885), 29 Ch. D. 921, there is a substantial question, as to the right of the infants to the property, to be tried, it may be quite proper to refuse to try the question other than in the ordinary mode of trial. In that case the question was whether the infants had any present right to, or the Court any power over, the property; it having been left by the giver of it in the discretionary power of trustees: and yet in that case it was said that the order could be made on an originating summons, but not in the method adopted in that case: see Order LV., Rule 25. Nothing was said on the subject of assent or dissent of the trustees as affecting the ruling, and in it an order was made, an order just such as is sought in this case: see Simpson on Infants, 3rd ed., p. 271.

I cannot imagine any good reason for considering that sec. 31 (2) of the Infants Act does not cover such a case as this; but, if it did not, under the Rules of Court, which have the effect of statutory enactment, the application would be quite regular by way of originating motion; and, as the difference between a Judge sitting in Court and sitting in Chambers has now grown to be even something less than gowned or not gowned, any technical objection on that score ought to be quite short-lived: see Rules 600 and 605. I may add that I have not found any case of this kind, since *In re Lofthouse* was decided, or indeed for some time before that, in which the question involved was raised in an action; all are cases of a summons in Chambers or in Court;

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and no difficulty seems to have arisen in dealing with the matter in that way.

It is not whether the trustee approves of or objects to the application; it is whether the opposition to it, by whomsoever offered, raises a question which ought to be tried in the ordinary way and one which the party objecting desires to have tried in that way.

Nothing then of a formal character stands in the way of this application: and the simple facts involved in it are, that:—

The infant children own absolutely, the one, about \$1,700, and, the other, about \$1,900; their shares, or what remains of them, of the estate of their father: the one child is 18, and the other 16, years of age: they both live with their mother, who, since their father's death, has kept the family together, there being also a third child—a daughter also—who has come of age and has received her share of the estate. The mother is said to be without means, except such as may remain of her share of her husband's estate. Mother and daughters desire to continue to live together as one united family, as in the past; and that plan, carried out until the present time, seems to have proved, as one would naturally expect, the best possible for all of them. The daughters have no means of providing for their own maintenance and education except in the small fortune which each, as I have mentioned, has. Nor have they any present practical means of earning their own living; and each is old enough to appreciate the folly of reducing their small means more than reasonably can be avoided.

It is, of course, one of the first and highest duties of a guardian to provide for the maintenance and education of his wards, in a manner befitting their condition in life, limited, of course, by the means at his command available for the purpose; and, ordinarily, the whole of the income is available for the purpose, and as much of it as may be needed for the purpose it is his duty to apply to it. In strictness he ought not to encroach upon the principal without the authorisation of the Court; but, if he do, he may be reimbursed in passing his accounts; in effect that which the Court would have authorised beforehand may be subsequently ratified: the result being that the guardian takes the risk in not getting authorisation beforehand.

The expenditure should be for that only which is reasonably needed: and it is not needed when otherwise provided: or can, and should be, earned by the infant.

Taking into consideration the fact that mother and children have been enabled to continue to live together as one family; and that the education of these two children is being carried on with a view to better fitting them for desirable positions in life, no fault, based on experience, can be found with the order that was made three years ago; and no fault is found by any one with the way in which the moneys received under it have been expended: and, having regard to the proposed continuance of past satisfactory methods, and to the desire of every one concerned that they should be continued, there should be no hesitation in doing anything, within the power of the Court, to continue them, as long as the like circumstances continue, until, as to the share of each, she comes of age or marries.

And in doing that the Court is doing no more than could be accomplished without its aid, in this way. If not applied for, or if refused, the infants could contract with their mother to pay her for their maintenance and education: the contract, being for necessities, would be valid and enforceable. The difference in the two methods being merely in that course the waste of more of the infants' money in law costs; a thing as inexcusable as would be the waste of costs of an action to authorise or enforce that which can be as well done in a motion such as this.

The order to be made, on this application, should be that the Court is of opinion that the guardians should continue to pay for the maintenance and education of each of the infants the same annual sum of money as they have, under the order before mentioned, been paying: that is, \$300 for the older and \$250 for the younger; so long as past conditions as to maintenance and education continue, up to the time of each, respectively, attaining the age of 21 years or marrying: and an order may go accordingly, upon the additional affidavits specified during the argument being filed: costs out of the funds, one-half from each.

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[APPELLATE DIVISION.]

Jan. 14.

GRAINGER V. ORDER OF CANADIAN HOME CIRCLES.

Life Insurance—Benevolent Society—Contract of Insurance—Payment to Member on Attaining Certain Age—Power of Society to Alter Contract—Amendment of Laws of Society—R.S.O. 1877, ch. 167, sec. 4—3 Edw. VII. ch. 15, sec. 8—Fundamental Incorporation Declaration—Right of Member as Creditor—Beneficiary Fund—Life Expectancy Fund.

The judgment of MEREDITH, C.J.C.P., 31 O.L.R. 461, was affirmed.

Held, that a right had accrued to the plaintiff which made him a creditor of the defendants, and therefore entitled to enforce his right by action, before the amendment of 1914 was made by the defendants.

The fundamental incorporation declaration was not alterable under the powers given by the Act respecting Benevolent, Provident, and other Societies, R.S.O. 1877, ch. 167, sec. 4, nor under the powers in the defendants' constitution; and there was no power under the Act 3 Edw. VII. ch. 15, sec. 8, amending the Insurance Act, to postpone or change the expectancy age already fixed, as the amendment of 1914 purported to do. *Bartram v. Supreme Council of The Royal Arcanum* (1905), 6 O.W.R. 404, followed.

In re Ontario Insurance Act and Supreme Legion Select Knights of Canada (1899), 31 O.R. 154, distinguished.

Held, also, that the plaintiff's rights were not limited to payment of his debt out of a part of the "Beneficiary Fund" or out of the "Life Expectancy Fund"—he was entitled to be paid the amount awarded by the judgment below without discrimination as to the source of payment.

APPEAL by the defendants from the judgment of MEREDITH, C.J.C.P., 31 O.L.R. 461.

January 12 and 13. The appeal was heard by FALCONBRIDGE, C.J.K.B., HODGINS, J.A., LATCHFORD, and KELLY, JJ.

J. E. Jones and *N. Sommerville*, for the appellants. Section 8 of 3 Edw. VII. ch. 15, an Act to amend the Insurance Act, is a mere enabling enactment; the defendants had the right to abolish life expectancy payments altogether without any legislative sanction. The defendants have always had the right to amend their constitution, laws, rules, and regulations. The plaintiff, by his application, beneficiary certificate, and obligation, agreed to be governed by all changes in the constitution, laws, rules, and regulations made from time to time by the Supreme Circle of the defendants: *In re Ontario Insurance Act and Supreme Legion Select Knights of Canada* (1899), 31 O.R. 154; *Bartram v. Supreme Council of The Royal Arcanum* (1905), 6 O.W.R. 404; *Wilson v. Miles Platting Building Society*

(1887), 22 Q.B.D. 381 (note); *Bradbury v. Wild*, [1893] 1 Ch. 377; *Doidge v. Dominion Council of Canada and Newfoundland Royal Templars of Temperance* (1902), 4 O.L.R. 423. If a member is to receive benefits, he must remain a member. At all events the judgment should be varied by providing that payment to the plaintiff should be made out of the "Life Expectancy Fund."

I. F. Hellmuth, K.C., for the plaintiff, the respondent. When the plaintiff had paid in the \$1,000, he became a creditor of the defendants, and was no longer a member. The defendants may affect the existing members by altering the rules, but cannot alter creditors' rights under a contract. The defendants had no power to alter their articles of association or their constitution.

Sommerville, in reply.

January 14. The judgment of the Court was delivered by HODGINS, J.A.:—The amendments of 1914 have provided no age at which the yearly payments are to commence, so far as the respondent is concerned. If, therefore, he elects to accept option B., he gets nothing; while, under clause 4 of the amendment, if he rejects the option, he is shut out from all benefits. This amounts to confiscation of his rights, which the respondent claims had accrued to him when he became 70. No doubt, this was not the intention, but the Court has to deal with his rights as affected by the clause as enacted. That being so, the appellants must shew that their powers of amendment are extensive enough to warrant what they have done.

The powers relied on are three: first, the Act respecting Benevolent, Provident, and other Societies, R.S.O. 1877, ch. 167, sec. 4; secondly, the powers mentioned in article XIV. of the constitution; and, thirdly, those in the Act of 1903, 3 Edw. VII. ch. 15, sec. 8, now found in the Insurance Act, R.S.O. 1914, ch. 183, sec. 185.

Those given by the Act respecting Benevolent, Provident, and other Societies, under which this organisation was incorporated, are limited to what is necessary for the government and control of the affairs of the society, and do not permit an altera-

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tion of the fundamental declaration; this appears from *Bartram v. Supreme Council of The Royal Arcanum*, 6 O.W.R. 404.

The powers given by the constitution in article XIV. are limited to the alteration of the constitution and laws, which begin at p. 11 of exhibit 3, and do not include authority to alter the original incorporation declaration by which (p. 5, clause 5) members are entitled to half of the amount of their beneficiary certificate on attaining the expectancy age. This age having been reached, and the respondent having complied with all the lawful requirements of the Order, he became entitled to one-half of the amount of the beneficiary certificate, subject to the change sanctioned by the Act of 1903.

Then, looking at the powers under that Act, it would appear that the change which had been made in 1897 became thereby valid, the payment of \$100 being made payable yearly, instead of, as originally provided, in a lump sum at the expectancy age. There is no power under that Act to postpone or change the expectancy age already fixed, as the amendment of 1914 purported to do.

Mr. Sommerville relied upon a number of cases, both English and Canadian, as indicating that a member was bound by any change in the laws and regulations which might take place after he became a member, although they affected materially the rights which he had acquired. All these cases depend, in the end, upon the consent of the member, arising from his express or implied agreement to be bound by any changes in the laws, rules, or regulations.

In the case of *In re Ontario Insurance Act and Supreme Legion Select Knights of Canada*, 31 O.R. 154, chiefly relied upon, the constitution and laws were made part of the original declaration; therefore, the powers of amendment were held to apply to that original declaration. That is not the case here, where there is no such consent. In the respondent's application he agreed to abide by the constitution, laws, rules, and regulations then in force, or which might thereafter be enacted. A reference to the book, exhibit 3, shews that the original declaration is not included within the scope of that agreement. He did not agree to a

change in the fundamental declaration which in fact remains in force, save as altered under the authority of the statute of 1903.

In the beneficiary certificate the only reference is to the laws, rules, and regulations—the same wording as in the application, except that the certificate leaves out the word “constitution.” In the certificate there is no agreement as to changes and no reference to the fundamental declaration.

None of the cases cited seem to affect the right of a member after, having complied with the regulations, he has become a creditor, and become entitled thereby to a certain sum of money, his right to which arises independently of his remaining a member of the Order; and we think that a right had accrued to the respondent which made him a creditor, and therefore entitled to enforce his rights by action, before the amendment of 1914 was made.

No case has been cited enabling a society, when it has become a debtor, to forfeit or impair its creditor's rights to his debt, or to postpone its payment, or to make that payment conditional upon further payments by the creditor.

Mr. Jones argued that, at all events, the judgment should be varied by providing that payment to the respondent should be made out of a fund called the “Life Expectancy Fund.” In view of the amendment of 1897, which made the “Beneficiary Fund” the fund out of which life expectancy benefits were to be paid, it is impossible now to cut down the respondent's rights by declaring that they are limited to payment out of a part of that fund, or out of a fund which exists apart from it. He is entitled to be paid the amount as declared by the judgment, without discrimination as to its source.

For these reasons, we think the appeal should be dismissed with costs.

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TILL V. TOWN OF OAKVILLE.

Jan. 18.

Negligence—Death Caused by Electric Shock—Liability of Telephone Company—Evidence of Negligence—Finding of Trial Judge—Reversal on Appeal—Dismissal of Action as against one of two Defendants—Costs.

It is not enough for the plaintiff to shew that he has sustained an injury under circumstances which may lead to a suspicion, or even a fair inference, that there may have been negligence on the part of the defendant; the plaintiff must give evidence of some specific act of negligence on the part of the person against whom he seeks compensation.

Lovegrove v. London Brighton and South Coast R.W. Co. (1864), 16 C.B. N.S. 669, 692, applied.

And *held*, upon the evidence, reversing the judgment of MIDDLETON, J., 31 O.L.R. 405, that the plaintiff's case against the defendant the Bell Telephone Company of Canada failed; and the company's appeal against the judgment was allowed with costs and the action as against the company dismissed with costs.

The other defendant, the municipal corporation, did not appeal from the judgment against it, but was made a respondent to the telephone company's appeal; in its statement of defence and at the trial it contended that the act of the telephone company was the *causa causans* of the death of the deceased, and that the company and not the corporation was liable to the plaintiffs:—

Held, that it was reasonable for the plaintiffs to join the company as a defendant, and that the costs to be received by the plaintiffs from the corporation should include all costs incurred against the company by reason of there being two defendants, and also the costs which the plaintiffs would have to pay to the company.

Besterman v. British Motor Cab Co., [1914] 3 K.B. 181, followed.

APPEAL by the defendant the Bell Telephone Company of Canada from the judgment of MIDDLETON, J., 31 O.L.R. 405.

December 10 and 11, 1914. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A.

D. L. McCarthy, K.C., and F. M. Burbidge, for the appellant company, referred to *Dominion Natural Gas Co. Limited v. Collins and Perkins*, [1909] A.C. 640, 646, *per* Lord Dunedin. The learned trial Judge refers to *Mills v. Armstrong, The Bernina* (1888), 13 App. Cas. 1, but that case is not applicable here, and he fails to apply the real test indicated in the *Collins and Perkins* case, *supra*, at p. 646. They referred to *Sullivan v. Creed*, [1904] 2 I.R. 317; *Dixon v. Bell* (1816), 5 M. & S. 198. [Garrow, J.A., referred to *Clark v. Chambers* (1878), 3 Q.B.D. 327, where the cases are reviewed by Cockburn, C.J.] On the question of apportionment of damages, they referred to Mayne on Damages, 8th ed., p. 540.

R. McKay, K.C., for the defendant the Corporation of the Town of Oakville, respondent, stated that that corporation had not appealed. The grounding of secondary wires was a practice opposed by underwriters and was not an accepted practice in 1908. He referred to *Sutton v. Town of Dundas* (1908), 17 O.L.R. 556.

M. H. Ludwig, K.C., for the plaintiffs, respondents, argued that both defendants were negligent, and referred to *Davies v. Mann* (1842), 10 M. & W. 546; *Radley v. London and North Western R.W. Co.* (1876), 1 App. Cas. 754; Pollock on Torts, 9th ed., pp. 481-484. On the question of costs, he referred to *Besterman v. British Motor Cab Co.*, [1914] 3 K.B. 181.

McCarthy, in reply.

January 18, 1915. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant the Bell Telephone Company from the judgment, dated the 27th May, 1914, and the 24th June, 1914, which was directed to be entered by Middleton, J., after the trial of the action before him, sitting without a jury at Toronto on the 14th and 15th days of May, 1914, in so far as the appellant is affected by the judgment.

By the judgment it is ordered and adjudged: (1) that the respondent plaintiff shall recover against the appellant and the respondent corporation \$6,000; and (2) that the appellant and the respondent corporation shall pay to the respondent plaintiffs the costs of the action, and that they shall be liable as between themselves for these costs in equal shares.

The reasons for judgment of the learned Judge are reported in 31 O.L.R. 405, and the material facts are there stated.

As I understand the reasons for judgment, the learned trial Judge based his conclusion, that the appellant was liable, upon his finding that the risers on the town's electric light pole were brought into contact while Whitney, the employee of the appellant who placed the rings on the messenger wire, was engaged in that work. He acquitted Whitney of any intentional displacement of the risers, but was not satisfied that he may not have brought them into contact accidentally. Everything he

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said was consistent with the displacing of the risers while the rings were being placed on the messenger wire, and all other possible causes of the displacement had, he thought, been investigated without result.

I am, with great respect, of opinion that the finding of the learned Judge is not warranted by the evidence. Whitney, who was called as a witness by the respondent plaintiffs, testified that the displacement of the risers was not caused by him; that he noticed the condition of the risers, and realised that he could not come into contact with them without endangering his life, and that he carefully avoided doing so. There is no doubt upon the evidence that it was difficult—perhaps very difficult—to do the work in which Whitney was engaged—doing it in the way he said he did it—without his having come into contact with the risers; but it is not shewn that it was impossible.

It was suggested, in the course of the examination of some of the witnesses, that, owing to the swaying of the messenger wire to which Whitney was suspended, or to muscular contraction, his legs, or one of them, may have displaced the risers without his being aware of what had happened. I do not know whether that was the view of my learned brother, but, if it was, I cannot agree with it. The evidence of the expert witnesses—I refer particularly to the testimony of Mudge, p. 375—is, that it would require considerable physical force to have caused such a displacement of the risers as existed on the day the deceased was killed; and it was improbable, I think, that the movement of Whitney's legs in the way suggested would have brought sufficient force to bear on the risers to have caused that displacement. Any other act of Whitney's which could have caused the displacement must have been a conscious act, and of such an act Whitney is acquitted by the learned Judge.

I am unable to discover any finding, at all events a finding in terms, that the act which the learned Judge thought caused the displacement of the risers was a negligent act, though no doubt the learned Judge, when dealing with the legal aspect of the case, speaks of the deceased's death as having been the result of two independent acts of negligence on the part of the respective defendants, and I do not find anything in the evid-

ence that, assuming the finding that the displacement was unconsciously caused by Whitney, warrants a finding that his act was a negligent act; indeed, the finding that it was an unconscious act rather implies that it was not.

Then, too, the work that Whitney was doing was performed between the 15th and the 27th March, probably midway between these dates, and the accident did not occur until the 13th April following; and, granting that the displacement of the risers must have been caused by human agency, the possibility that it was not the result of some act other than that of Whitney was not eliminated. It was not beyond the range of probability, certainly not beyond the range of possibility, that it was caused by the act of a mischievous boy or the wilful act of some evil-disposed person.

Counsel for the respondent corporation was evidently impressed with the difficulty of connecting Whitney's supposed act with the displacement of the risers, for an effort, which failed, was made to shew that the electric light pole bore the marks of spurs, recently made, and to connect these with something done by an employee of the appellant named Stewart on the day before that on which the accident happened.

It appears to me also that it is unlikely that, if the displacement had been caused by Whitney, the condition of the risers would not have been noticed by those who had the superintendence of the town's electric light system, and the interval of time that elapsed between Whitney's supposed act and the happening of the accident is a circumstance—though no doubt not a conclusive one—tending to negative the theory which was put forward at the trial and adopted by the learned Judge.

The observations of Willes, J., in *Lovegrove v. London Brighton and South Coast R.W. Co.* (1864), 16 C.B.N.S. 669, 692, are apposite, I think, to this case. He here says: "It is not enough for the plaintiff to shew that he has sustained an injury under circumstances which may lead to a suspicion, or even a fair inference, that there may have been negligence on the part of the defendant; but he must go on and give evidence of some specific act of negligence on the part of the person against whom he seeks compensation."

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Upon the whole, I am of opinion that the respondent plaintiffs' case against the appellant failed, and that the appeal should be allowed and judgment entered dismissing the action as against the appellant with costs.

It was contended by counsel for the respondent plaintiffs that, if we should come to that conclusion, the costs to be received by them from the respondent corporation should include all costs incurred against the appellant by reason of there being two defendants, and also the costs which they would have to pay to the appellant, and counsel cites in support of his contention *Besterman v. British Motor Cab Co.*, [1914] 3 K.B. 181, in which such an order as to costs was made.

I am of opinion that a similar order should be made in this case. The test to be applied in determining whether such an order should be made is, "Was it a reasonable thing for the plaintiff in his action against a man who ultimately turns out to be in fact the wrongdoer to join the other defendant in order that the matter might be thoroughly threshed out?" And Vaughan Williams, L.J., said (p. 187): "Of course, the fact that there were two people who upon the face of the transaction might, either of them, have been guilty is what made it reasonable in the plaintiff, when he brought this action, to join both of these defendants."

In the case at bar, the respondent corporation, in its statement of defence set up, and throughout the trial contended, that the act of the appellant was the *causa causans* of the death of the deceased, and that the appellant and not the corporation was liable to the respondent plaintiffs; and, in my opinion, it was reasonable for the respondent plaintiffs to join the appellant as a defendant.

Appeal allowed.

[APPELLATE DIVISION.]

POUCHER V. WILKINS.

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Jan. 18.

Execution—Life of Judgment—Limitations Act, 10 Edw. VII. ch. 34, sec. 49—"Proceeding"—"Action"—Presumption of Payment—Renewal of Fi. Fa.—Ministerial Act—Rule 571.

The right to renew a writ of *fiери facias* issued upon a judgment, within six years after the recovery thereof, and kept alive by renewals, is not barred by sec. 49 of the Limitations Act, 10 Edw. VII. ch. 34, at the expiration of twenty years from the recovery of the judgment (in the absence of part payment or acknowledgment): the interpretation clause of the Act, sec. 2(a), does not extend the meaning of the word "action," as used in sec. 49, so as to include the proceeding by which a writ is renewed.

Difference between the language of sec. 23 of R.S.O. 1897, ch. 133, and that of sec. 49, above referred to, pointed out, and cases decided under sec. 23 or its prototype, distinguished: *Caspar v. Keachie* (1877), 41 U.C.R. 599; *Neil v. Almond* (1897), 29 O.R. 63; *In re Woodall* (1904), 8 O.L.R. 288; *McDonald v. Grundy* (1904), 8 O.L.R. 113.

The amendment of sec. 23 by 5 Edw. VII. ch. 13, sec. 10, afterwards embodied in sec. 24(2) of 10 Edw. VII. ch. 34, did away with the effect of the cases referred to, at all events where the execution debtor was possessed of land upon which the execution operated as a lien or charge.

The common law rule for presuming payment of a specialty after twenty years is no longer applicable.

History of the legislation.

In this case, the plaintiff having issued execution in due time, no application for leave to issue execution was necessary; the renewal after the expiration of the twenty years was a mere ministerial act on the part of the officer of the Court by whom it was renewed, whose duty it was to sign the memorandum required by Rule 571 of the Rules of 1913, when the plaintiff produced the execution, while, according to its terms, it was still in force, and requested him to sign it.

Price v. Wade (1891), 14 P.R. 351, distinguished.

Order of DENTON, Jun. Co. C.J., York, setting aside a writ of *fiери facias* issued upon a judgment recovered in 1891, within six years from the date of that judgment, and kept alive by renewals, reversed.

AN appeal by the plaintiff from an order dated the 20th November, 1914, made by a Junior Judge of the County Court of the County of York (DENTON), vacating and setting aside the writ of execution issued on the plaintiff's judgment recovered in that Court.

The judgment was recovered on the 7th March, 1891, and the execution was issued within six years after that date, and had been kept alive by renewal ever since; the last renewal having been made on the 15th October, 1913, and being still in the hands of the Sheriff to whom it was directed for execution.

December 21, 1914. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

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W. N. Ferguson, K.C., for the appellant, argued that, so long as the execution was renewed from time to time, it could thus be kept alive forever, and that the Statute of Limitations did not apply. He referred to an article on "The Life of a Judgment" in 8 C.L.T., p. 205, at p. 218. Section 49* of the Limitations Act, 10 Edw. VII. ch. 34, he contended, has no application to anything other than an action or a proceeding in the nature of an action, and the proceeding under review was neither of these: *McCullough v. Sykes* (1885), 11 P.R. 337; *Mason v. Johnston* (1893), 20 A.R. 412; *McMahon v. Spencer* (1886), 13 A.R. 430.

M. H. Ludwig, K.C., for the defendant, respondent, contended that the renewal of the execution was a civil proceeding within the meaning of sec. 2 of 10 Edw. VII. ch. 34, and that sec. 49 therefore applied to such a proceeding, and barred the renewal of the execution: 32 Cyc. 406; *Ex p. Caucasian Trading Corporation Limited*, [1896] 1 Q.B. 368; *Price v. Wade* (1891), 14 P.R. 351; Halsbury's Laws of England, vol. 14, para. 8.

January 18, 1915. The judgment of the Court was delivered by MEREDITH, C.J.O. (after stating the facts as above):—The ground upon which the learned Judge proceeded was that, in the absence of payment or acknowledgment, there is no right to issue execution upon a judgment more than twenty years old, and he evidently treated the renewal of an execution that had been issued within that period as the issue of an execution on the day on which it was renewed.

Upon the argument before us, counsel for the respondent relied upon sec. 49 of the Limitations Act in force when the execution was renewed (10 Edw. VII. ch. 34) to support the order of the learned Judge, contending that the renewal of the execution was a civil proceeding within the meaning of sec. 2 of that Act; and that sec. 49 was, therefore, to be read as applying to such a proceeding; and, in the absence of part payment or acknowledgment, barring the right to take it after the expiration of twenty years from the date on which the judgment was recovered.

*49.—(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned: . . . (b) An action upon a bond, or other specialty . . . within twenty years after the cause of action arose.

I am of opinion that this contention is not well-founded, and that sec. 49 has no application to anything but an action or a proceeding in the nature of an action.

The provisions of what is now sec. 49 were first enacted by sec. 3 of 7 Wm. IV. ch. 3, and were the same as those of sec. 3 of the Imperial Act 3 & 4 Wm. IV. ch. 42, which provided, among other things, that actions of covenant or debt upon a bond or other specialty should be commenced and sued within twenty years after the cause of such actions arose.

No change, except verbal ones, was made in this enactment in the consolidation of the statutes of Upper Canada in 1859, or in the revisions of the statutes in 1877, 1887, and 1897, except that the words "covenant or debt" were eliminated in the revision of 1887, no doubt because forms of action had been abolished by the Judicature Act. In 1910, with a view to the revision of 1914, the various limitation Acts were consolidated by 10 Edw. VII. ch. 34. In this enactment the interpretation section was introduced, which, so far as is material to the present inquiry, reads as follows (sec. 2 (a): "'Action' shall include an information on behalf of the Crown, and any civil proceeding." And a group of sections, beginning with sec. 49, forms Part III., which is headed "Personal Actions."

Does, then, this interpretation section extend the meaning of the word "action," as used in sec. 49, so as to include "any civil proceeding"? In my opinion, it does not.

It is clear that, at all events until the introduction of the interpretation section, the limitation of twenty years in the Revised Statutes of 1887 was applicable only to actions, and it was so treated by the Chancellor in *Chard v. Rae* (1889), 18 O.R. 371.

The section is not applicable where it would give to the word "action" "an interpretation . . . inconsistent with the context" (8 Edw. VII. ch. 33, sec. 1, adding sub-sec. (2) to sec. 6 of the Interpretation Act, 7 Edw. VII. ch. 2); and that would be the effect of applying it to sec. 49.

It is plain, I think, that the word "action" is used in sec. 49 in its ordinary sense. As I have said, Part III., of which sec. 49 is the first section, is headed "Personal Actions;" a well-

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understood term, which clearly does not include such a proceeding as the issue or the renewal of a writ of execution. The word "commenced" is the appropriate word to apply to the bringing of an action, and is inappropriate to the taking of such a proceeding as the issue or the renewal of a writ of execution; and the period from which the twenty years are to be reckoned is that at which the cause of action arose, meaning plainly, I think, the cause of the "action" with which the section is dealing—an action of covenant or debt on a bond or other specialty. "Cause of action" is a well-understood phrase, and comprises "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court:" per Lord Esher, M.R., in *Read v. Brown* (1888), 22 Q.B.D. 128, 131; and a "cause of action arises" (within the meaning of the Limitations Act) "at the time when the debt could first have been recovered by action:" per Lindley, L.J., in *Reeves v. Butcher*, [1891] 2 Q.B. 509, 511, following *Hemp v. Garland* (1843), 4 Q.B. 519.

If the meaning which it is contended should be given to the word "action" were given to it, the result would be that a plaintiff who had issued his writ within the prescribed period could not after that period had expired take any step in the action, which is *reductio ad absurdum*.

For these reasons, I am of opinion that the appellant's right to renew his execution was not barred by sec. 49 at the expiration of twenty years from the recovery of his judgment.

This conclusion is not opposed to what has been decided in any reported case.

In *Caspar v. Keachie* (1877), 41 U.C.R. 599, it was held by Wilson, J., that a writ of revivor or suggestion entered upon the roll (*i.e.*, a suggestion that the plaintiff was entitled to have execution on his judgment) was a proceeding within the meaning of sec. 11 of 38 Vict. ch. 16, and that a judgment was, under that section, to be considered as charged upon or payable "out of land," and that "it cannot be revived by writ or suggestion, if the debtor oppose the rule to shew cause, or, if the proceeding be by writ of revivor, if the defendants appear to the writ and plead the defence of the limitation of ten years;" and that

learned Judge also held that the objection, not having been raised until after the suggestion had been entered on the roll, came too late.

In *Neil v. Almond* (1897), 29 O.R. 63, it was decided by Ferguson, J., that what he held to be the lien on the defendant's land created by the plaintiff's execution was barred after the expiration of ten years from the day on which it had been placed in the hands of the Sheriff to be executed, notwithstanding that during all that time it had been kept alive by renewals, and that advertising the defendant's land for sale under the execution was a proceeding to recover money that was a lien and charged upon and payable out of the land within the meaning of sec. 23 of ch. 111 of the Revised Statutes of 1887.

In *In re Woodall* (1904), 8 O.L.R. 288, it was held by a Divisional Court, affirming a judgment of Street, J., that *Neil v. Almond* was well decided, and that the lien created by the delivery of the writ to the Sheriff for execution became barred upon the expiration of ten years from the day on which it was placed in the Sheriff's hands, notwithstanding that it had been renewed from time to time and kept in force continuously. The head-note to the report states that it was decided that sale proceedings could not be taken under it after the ten years; I do not find anything in the reasons for judgment to support that statement, although that would follow as a result of the decision.

In *McDonald v. Grundy* (1904), 8 O.L.R. 113, it was held by Meredith, J., that a proceeding to sell under a mortgage of land was a proceeding within the meaning of sec. 23 of ch. 133, R.S.O. 1897, and that the ten years' limitation prescribed by that section was applicable to the proceeding to sell.

In these cases the question arose on what was sec. 23 of ch. 133, R.S.O. 1897, or its prototype, the language of which differs materially from that employed in sec. 49. What sec. 23 provided was that "no action or other proceeding shall be brought to recover out of any land or rent any sum of money secured by any mortgage or lien, or otherwise charged upon or payable out of such land or rent . . . but within ten years . . . ;"

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and none of the reasons which have led me to the conclusion to which I have come has any application to this enactment.

It may be pointed out that, after the decision in *In re Woodall*, the section under consideration in that case was amended by adding to it the words of qualification which it was suggested by the Court (p. 292) were necessary to give to the section the construction unsuccessfully contended for by the plaintiff's counsel in that case (5 Edw. VII. ch. 13, sec. 10).

In the Act of 1910 there was substituted for the qualifying words added to sec. 23 a sub-section to sec. 24, which is the number of the section by which sec. 23 was re-enacted, which reads as follows: "(2) Notwithstanding the provisions of sub-section 1, a lien or charge created by the placing of an execution or other process against lands in the hands of the Sheriff or other officer to whom it is directed shall remain in force so long as such execution or other process remains in the hands of such Sheriff or other officer for execution and is kept alive by renewal or otherwise."

This change did away with the effect of the decisions to which I have referred, at all events where the execution debtor was possessed of land upon which the execution operated as a lien or charge.

I am also of opinion that the order cannot be supported on the ground that, there having been no payment or acknowledgment in the meantime, it is to be presumed at the expiration of twenty years from the date of its recovery that the appellant's judgment is satisfied.

Before the passing of the Imperial Act 3 & 4 Wm. IV. ch. 42, there was no statutory provision limiting the time within which an action of debt or covenant on a bond or other specialty must be commenced, but the Courts had, by analogy to the Statute of Limitations, established the artificial presumption that where payment of a bond or other specialty was not demanded for twenty years, and there was no proof of payment of interest or any other circumstance to shew that it was still in force, payment or release ought to be presumed: *Best on Evidence*, 11th ed., p. 390. The lapse of twenty years where no demand had been made during that time was only a circumstance for

the jury to found a presumption upon, and was itself no legal bar: *per* Buller, J., in *Oswald v. Legh* (1786), 1 T.R. 270, 271.

This presumption was applicable to actions and to proceedings by *scire facias* on judgments, because the judgment debt was a debt by specialty. The Courts in early times were lenient to judgment debtors, and established the rule that, if a judgment creditor did not issue his execution within a year and a day, he had, in the case of a personal action, to bring an action on his judgment, and in the case of a real action he had either to bring an action or to proceed by *scire facias*. This practice was founded on the theory that if an execution was not issued within a year and a day it was to be presumed, until the contrary was shewn, that the judgment was satisfied.

The modes of proceeding with respect to both classes of action were made uniform by the Statute of Westminster 2 (13 Edw. I., stat. 1, ch. 45), which gave a *scire facias* to the plaintiff in a personal action to revive the judgment where he had omitted to sue execution within the year after the judgment was obtained: Tidd's Practice, 8th ed., pp. 1152, 1153.

Where, however, a *fiery facias* or *capias ad satisfaciendum* was taken out within the year and not executed, a new writ might be sued out at any time afterwards without a *scire facias* if the first writ were returned and filed, and continuances were entered from the time of issuing it.

This practice, so far as it obtained in Ontario, was changed by the Common Law Procedure Act, 1856 (19 Vict. ch. 43); sec. 202 of which provided that: "During the lives of the parties to a judgment, or those of them during whose lives execution may at present issue within a year and a day without a *scire facias*, and within one year from the recovery of the judgment, execution may issue without a revival thereof."

By sec. 203 provision was made that where it should become necessary to revive a judgment, by reason of lapse of time or of a change by death or otherwise of the parties entitled, or liable to execution, the party alleging himself to be entitled to execution might either sue out a writ of revivor or apply for leave to enter a suggestion on the roll, to the effect that it manifestly appears to the Court that he is entitled to have execu-

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tion of the judgment, and to issue execution thereupon, and that this leave should be granted by the Court on a rule to shew cause, or by a Judge upon a summons to be served according to the practice, or in such other manner as the Court or Judge should direct; and by sec. 207 it was provided that a writ of revivor to revive a judgment less than ten years old should be allowed without a rule or order; if more than ten years old, not without a rule of Court or Judge's order; and if more than fifteen years old, not without a rule to shew cause.

By sec. 189 it was provided that a writ of execution should remain in force for one year from the teste, and no longer if unexecuted, but that it might be renewed at any time before its execution for one year from the date of renewal, and that the writ when so renewed should have effect and be entitled to priority according to the time of its "original delivery."

By 20 Vict. ch. 57, sec. 10, sec. 202 of the Act of 1856 was repealed, and it was provided that "during the lives of the parties to a judgment or those of them during whose lives execution may at present issue within a year and a day without a *scire facias*, and within six years from the recovery of the judgment, execution may issue without a renewal thereof."

In the consolidation in 1859 of the Statutes of Upper Canada this section was recast and made to read as follows: "During the lives of the parties to a judgment, or any of them, execution may be issued at any time within six years from the recovery of the judgment, without a revival thereof by *scire facias*, or by writ of revivor" (C.S.U.C. ch. 22, sec. 301).

In this consolidation, sec. 203 of the Act of 1856 became sec. 302, and sec. 189, with the words "to the Sheriff" added at the end of it, became sec. 249.

By 27 Vict. ch. 13, sec. 2, owing to doubts that had arisen as to whether there could be more than one renewal, sec. 249 of the Act in the Consolidated Statutes was amended by inserting after the word "expiration" the words "and so from time to time during the continuance of the renewed writ."

By Rule 872 of the Consolidated Rules of the 1st September, 1897, which have the force of a statutory enactment, it is provided that a writ of *feri facias* if executed is to remain in force

for three years only from its issue, but may, at any time before its expiration, be renewed by the person issuing it for three years from the date of renewal, and so on from time to time during the continuance of the renewed writ, and that a writ so renewed shall have effect and be entitled to priority according to the time of the original delivery; and by sec. 9 of the Execution Act, 9 Edw. VII. ch. 47, subject to certain qualifications which do not affect the question under consideration, a writ of execution binds the goods and lands against which it is issued from the time of its delivery to the Sheriff for execution.

Under the old practice, "after *feri facias* or *elegit* if not executed a new *feri facias* or *elegit* may be sued out several years afterwards without suing a *scire facias*, provided the continuances are entered from the time of the first *feri facias*:" *Welden v. Greg* (1662), 1 Siderfin 59; *Simpson v. Heath* (1839), 3 Jur. 1127.

In the latter of these cases there was an interesting discussion as to this practice, and numerous old cases were cited and discussed. It appears from the argument of counsel, and from what was said by Baron Parke in delivering the judgment of the Court, that according to this practice there was no limit to the time within which the *feri facias* or *capias ad satisfaciendum* might be issued; and counsel for the defendant pointed out that under it "a man might arrest another on a writ taken out forty years before, and kept in his pocket during that time, and of which the other could have no possible notice" (p. 1129); to which it was replied by Baron Parke: "In strict practice, there ought to be an award of judgment on the judgment-roll, that would give the defendant notice." Counsel for the defendant argued that this practice was "inconsistent with the spirit of 3 & 4 Wm. IV. ch. 42, sec. 3, which prohibits proceedings in debt, covenant, or *scire facias*, from being instituted after twenty years," and that "it never could have been the intention of the Legislature to allow a party to sue out a writ of executoin, and keep it by him for more than twenty years, and then execute it." During the argument, Baron Parke quoted with approval the following passage from Tidd's Practice, 9th ed., p. 1103: "When a *fi. fa.* or *ca. sa.* is taken out within the year and not

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executed, a new writ of execution may be sued out at any time afterwards without a *scire facias*, provided the first writ be returned and filed, and continuances entered from the time of issuing it, which continuances may be entered after the issuing of the second writ."

In *Jenkins v. Kerby* (1866), 2 U.C.L.J. N.S. 164, it was held by Draper, C.J., that a writ of execution may be sued out at any time within six years from judgment without a writ of revivor, and if during the six years a writ of execution is sued out and returned and filed the same consequences follow as if, under the old practice, a writ had been sued out within a year and a day and returned and filed; that is, such a writ will support a subsequent writ issued after that period without a *scire facias* or revivor.

It seems to me that the same principle as that upon which this practice was founded is applicable under our practice to an execution issued within six years and kept alive by renewals beyond the period of twenty years; for if under the old practice a new execution might be issued at any time, provided an execution had been issued within the year and returned and filed, and continuances entered from the time of issuing it, an execution issued within six years, which at all times from its issue has been kept in force and in the hands of the Sheriff, should be in at least as good a position as the new execution under the old practice, and the renewal at least as effectual as the issue of the new execution.

It may be pointed out also that in *Du Belloix v. Lord Waterpark* (1822), 1 D. & R. 16, 17, which was an action on a promissory note dated the 27th December, 1787, and payable six months after date, Abbott, C.J., was asked by the defendant's counsel to direct the jury that they were bound to presume from analogy to the case of a bond that after twenty years the note had been paid, although there was no proof that the payee had been within the realm; but the Chief Justice refused to give such a direction, and expressed the opinion that "the case of a bond was distinguishable from promissory notes and bills of exchange, which were simple contracts, and were subjected to the provisions of the Statute of Limitations; whereas the rule for

presuming payment of a bond after twenty years was founded on common law, there being no statutable provision with respect to obligations of that nature."

If this opinion was well-founded, as there is now such a statutable provision as to specialties as was at that time wanting, the common law rule for presuming payment of a specialty after twenty years would seem to be no longer applicable.

The Chancellor, however, in *Price v. Wade*, 14 P.R. 351, treated the presumption as applicable to an application for leave to issue an execution upon a judgment more than twenty years old.

It is unnecessary to express an opinion as to the correctness of this decision, as it has no application to such a case as this. Here no leave to issue execution was necessary; the appellant had issued execution in due time, and its renewal after the expiration of the twenty years was a mere ministerial act on the part of the officer of the Court by whom it was renewed, whose duty it was to sign the memorandum required by Rule 571 of the Rules of 1913, when the appellant produced the execution, while, according to its terms, it was still in force, and requested him to sign it.

Upon the whole, I am of opinion that the appeal should be allowed with costs, and the order appealed from reversed, and that there should be substituted therefor an order dismissing with costs the respondent's motion to set aside the execution.

Appeal allowed.

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Jan. 25.

Building Contract—Architect's Certificate—Non-conclusiveness—Terms of Contract—Collusion—Responsibility for Work Badly Done or Omitted.

An architect's certificate may be made, by express agreement, final and binding on both the building owner and contractor, and in that sense conclusive as between them; but not so if the contract itself affords evidence that the certificate is not finally to settle the matters with which it deals, and does not absolve the contractor from responsibility for work badly done or omitted.

Smallwood Brothers v. Powell (1910), 1 O.W.N. 1025, followed.

A building contract provided that no payment was to be made except on the architect's certificate that a certain amount of work had been done to his satisfaction. Payment was to be made at the rate of 80 per cent. on the value of work executed from time to time, and of the remainder a further 10 per cent. on the certified completion of the work, and the balance of 10 per cent. within six months after the architect had certified that the works were completed to his satisfaction. By the terms of the specifications, payment on any certificate was not to exonerate the contractor from liability for any defect attributable to bad material or bad workmanship. An action by the contractor against the building owner to recover a sum certified by the architect was tried by an Official Referee, who found that the amount paid by the defendant on account of the contract far exceeded the value of the work done and material furnished; that the material was bad and the work improperly done; that the architect had improperly issued the certificate under which the plaintiff claimed; and that both the plaintiff and the architect knew, when the certificate was given, that there was nothing due from the owner:—

Held, upon appeal from the judgment of the Referee, dismissing the action, that his findings, which were not attacked, afforded a complete answer to the plaintiff's claim; that the architect's certificate was not conclusive; and that the case was clearly one of fraudulent collusion.

APPEAL by the plaintiff from the judgment of J. A. C. Cameron, an Official Referee, dismissing an action or proceeding to recover the amount due for work done under a building contract, and to enforce a mechanic's lien.

January 14 and 15. The appeal was heard by FALCONBRIDGE, C.J.K.B., HODGINS, J.A., LATCHFORD and KELLY, JJ.

M. K. Lennox, for the appellant, argued that the architect's certificate was conclusive as between the appellant and respondent, and that the appellant should therefore be awarded the \$1,400 certified to: *Kelly v. Tourist Hotel Co.* (1909), 20 O.L.R. 267, at pp. 270 and 276; *Brown v. Bannantyne School District* (1912), 22 Man. R. 260; *Hamilton v. Vineberg* (1912), 4 D.L.R. 827, 3 O.W.N. 605, 1337; *Murray v. The Queen* (1896), 26 S.C.R.

203; Roscoe's Digest of Building Cases, 4th ed., p. 30; *Walkley v. City of Victoria* (1900), 7 B.C.R. 481; Wallace's Mechanics' Lien Laws, 2nd ed., p. 70; *Boettler v. Tendick* (1889), 73 Tex. 488; 6 Cyc. 40, 44; *Bloodgood v. Ingoldsby* (1857), 1 Hilton (N.Y.) 388; *Snaith v. Smith* (1893), 25 N.Y. Supp. 513. The owner might have recourse against the architect for negligence, but the certificate was final as between the owner and the contractor: *Rogers v. James* (1891), 8 Times L.R. 67.

R. H. Holmes, for the defendant, respondent, contended that the certificate of the architect was not always final. In this case, especially, where the certificate had been proven to be fraudulent, it could be impeached. The architect and contractor both knew that there was nothing due from the owner at the time that the certificate was given. In fact, the contractor had been overpaid a large amount. A certificate so obtained was a nullity: *Smallwood Brothers v. Powell* (1910), 1 O.W.N. 1025, at p. 1027.

January 25. The judgment of the Court was delivered by HODGINS, J.A.:—Mr. Lennox did not attack any of the findings of the Official Referee appearing in the report appealed from, but contended that the appellant was entitled to judgment for the amount of the architect's certificate for \$1,400 dated the 3rd June, 1913, which the respondent had refused to pay. He urged that it was conclusive as between the appellant and respondent, no matter whether the respondent had a claim arising out of the non-completion of the work or from its improper performance.

This contention leaves out of sight the meaning of the contract in this case, as well as the effect of the Referee's findings, supplemented as they were by a certificate procured, at the suggestion of the Court, by the parties.

An architect's certificate may be made, by express agreement, final and binding on both the owner and contractor, and in that sense conclusive as between them. But, as pointed out by the judgment of the Court of Appeal in *Smallwood Brothers v. Powell*, 1 O.W.N. 1025, that result by no means follows if the contract itself affords evidence that the certificate is not finally

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to settle the matters which it deals with, and does not absolve the contractor from responsibility for work badly done or omitted. See also *Watts v. McLeay* (1911), 19 W.L.R. 916, and *Contractors Supply Co. v. Hyde* (1912), 3 O.W.N. 723.

In this case no payment is to be made except on the architect's certificate "that a certain amount of work has been done to their (*sic*) satisfaction." Payment is to be made "at the rate of 80 per cent. on the value of work executed from time to time, and of the remainder a further 10 per cent. on the certified completion of the work, and the balance of 10 per cent. within six months after the architect has certified that the works are completed to his satisfaction." It is not stated in the architect's certificate here what amount of work has been done; and the finding of the Referee is, that "the amount paid by the defendant on account of the said contract far exceeds the value of the work done and material furnished." This affords a complete answer to the claim; for the appellant is entitled to only 80 per cent. of that value, and he has already received more than 100 per cent. thereof.

Apart from that, however, the certificate is not conclusive. Payment on any certificate is not, by the terms of the specifications, to exonerate the contractor from liability for any defect attributable to bad material or bad workmanship. The Referee found that the material was bad and the work improperly done. If payment of the amount of a certificate forms no bar to the contractor's liability, then, *â fortiori*, the giving of the certificate can put the matter in no better position.

But it is unnecessary to consider this point further, for the report charges the architect with improperly issuing this certificate, and the Referee's later finding states that both the appellant and the architect knew, when the certificate was given, that there was nothing due from the owner: a clear case of fraudulent collusion.

It may be noted that in *Hickman & Co. v. Roberts*, [1913] A.C. 229, the House of Lords has decided that improper interference by the building owners with the architect, in forbidding him to issue a certificate, was sufficient in itself to shew that the architect had abandoned his attitude of impartiality, and that the

obtaining of his certificate was therefore not a condition precedent to recovery of the amount properly due.

I have not considered whether the contract limits the appellant to his commission of 10 per cent. on the cost of erection, and does not go far enough to enable him to demand and receive the cost itself in the way indicated in the specifications.

The appeal should be dismissed with costs, which, however, are not to include the costs of procuring the evidence, in view of the application of the appellant, when launching his appeal, to dispense with it, on the ground that he proposed to argue the case wholly upon the findings of the Referee: a course which he scrupulously pursued.

Appeal dismissed.

[IN CHAMBERS.]

RE BERANEK.

Alien Enemy—Arrest and Detention—Habeas Corpus—Application for Discharge—Jurisdiction of Court—Consent of Minister of Justice—War Measures Act, 1914, 5 Geo. V. ch. 2, sec. 11 (D.)—Naturalised Alien.

In time of war, a prisoner arrested and detained by the military authorities as an alien enemy, obtained a *habeas corpus*, alleging that he was in fact a British subject by naturalisation; but, upon the return, his motion for discharge from custody was refused, upon the ground that he had not obtained the consent of the Minister of Justice—sec. 11 of the War Measures Act, 1914, providing that no person who is under arrest or detention as an alien enemy, or upon suspicion that he is an alien enemy, shall be released upon bail, or otherwise discharged or tried, without the consent of the Minister of Justice.

It is the duty of the Court to give full effect to that enactment: to attempt to whittle it down, or to evade its provisions in any respect, would be inexcusable, even in a hard case.

APPLICATION, upon the return of a writ of *habeas corpus*, for an order for the release of Rudolf Beranek, a military prisoner.

January 15. The application was heard by MEREDITH, C.J. C.P., in Chambers, at Toronto.

W. A. Henderson, for the prisoner.

Lieutenant Boulter, the custodian of the prisoner, appeared in person in answer to the writ.

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January 28. MEREDITH, C.J.C.P.:—The writ, in this case, was obtained on the assertion that the prisoner is held in military custody as an alien enemy, although, in fact, a British subject by naturalisation.

Assuming that to have been an accurate statement of the facts of the case, it by no means follows that the prisoner is entitled to be released from custody, nor indeed that the writ should have been issued, although the lawful power of the military, at the present time, may be to detain an alien enemy only.

In extraordinary times, extraordinary laws have been passed “for the security, defence, peace, order, and welfare of Canada;” and the power of the military authorities, and the rights of the prisoner, depend upon those laws, and that which has been rightly done under them; I mean, especially, the War Measures Act, 1914, 5 Geo. V. ch. 2 (D.), and the orders in council and proclamations made under it.

Under that enactment great authority has been conferred not only upon the Governor in Council but also upon the Minister of Justice.

The 6th section of the Act gives to the Governor in Council power to do and to authorise such acts and things, and to make from time to time such orders and regulations, as he may, by reason of the existence of actual or apprehended war, invasion, or insurrection, deem necessary or advisable for the security, defence, peace, order, and welfare of Canada, including expressly, among other things, “arrest, detention, exclusion, and deportation.”

And, under the 11th section, no person who is under arrest or detention as an alien enemy, or upon suspicion that he is an alien enemy, shall be released upon bail, or otherwise discharged or tried, without the consent of the Minister of Justice.

So that, in the very case made for the prisoner, upon the application for the writ, there is not only a prohibition against release, but a prohibition against even a trial—a trial, for instance, of the question whether he is or is not an alien enemy—without that which he has not only not obtained but not applied for, the consent of the Minister of Justice.

In these circumstances, after conferring with the learned

Judge who granted the writ, I am unable to change, or modify, the views expressed by me upon the argument of this motion, for the discharge of the prisoner from custody, that the motion should be refused.

It is quite true that soldier and sailor as well as civilian, Cabinet Minister as well as cabman, all are amenable to the process of this Court; but it is equally true that, where the law of the land confers upon Court or person any power, this Court has no right to interfere with the exercise, in good faith, of that power; it is only when the power so conferred is exceeded that this Court can interfere; unless some right of appeal to it is also conferred.

It is also, as a matter of law, quite immaterial what the opinion of any Judge, or other person, may be respecting the wisdom or unwisdom of conferring such powers, or of the wisdom or unwisdom of the way in which the power is exercised, provided it is exercised in good faith; but it should be plain to every one that in the stress and danger to the life of any nation in war, the Courts should be exceeding careful not to hamper the action of those especially charged with the safety of the nation; careful, among other things, not to take up the time and attention of those who should be fighting the enemy in the field, in fighting law suits in the law Courts over private rights. It is not a time when the prisoner is to have the benefit of the doubt; it is a time when, in all things great and small, the country must have every possible advantage; a time when it must be the general safety first in all things always; until the final victory is won; even though individuals may suffer meanwhile. Private wrongs can be righted then: while final defeat would not only prevent that but bring untold disasters to all.

It may be that the prisoner is a British subject, and if so, under the law as it now stands, his imprisonment is unlawful; but, being detained, as he alleges he is, "as an alien enemy, or upon suspicion that he is an alien enemy," he cannot "be released upon bail or otherwise discharged or tried, without the consent of the Minister of Justice:" the Parliament of Canada has so decreed in its War Measures' enactment, and decreed it "for the security, defence, peace, order, and welfare of Can-

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ada:" and it is the duty of the Courts to give full effect to that enactment: to attempt to whittle it down, or to evade its provisions in any respect, would be inexcusable, even in a hard case; which I feel bound to say this case does not appear to me to be: the prisoner, according to his own statement made, at his own urgent request, in open Court, is an Austrian—Viennese—by birth; a resident in Canada for about eight years; the husband of a Canadian wife, and the father of several children by her, all born in Canada, where his marriage took place; a British subject since the year 1910, when he became naturalised through proceedings in one of the Courts of General Sessions of this Province; arrested recently when seeking work at his trade of bricklayer, on, as he knew, forbidden grounds; and held as a prisoner of war ever since.

Whether he is in law a British subject may depend upon several questions of law and fact—for instance: whether the certificate of naturalisation, on which he relies, is a genuine one: whether it was obtained by fraud or is for any other reason invalid: whether naturalisation under the former laws of Canada, as distinguished from those passed last year, take the man out of the category of an alien enemy, or are confined to property and civil rights in Canada other than that in question: whether, in short, he can be, for war purposes, a British subject in Canada and an alien enemy on all other British soil.

Upon the man's own statement, to which I have referred, a strong suspicion was caused in my mind that he would not have been wrongly arrested if he could have been and had been arrested for spying out the land, though probably not in connection with any organised system, but only on his own account, to be made use of should there be opportunity. In these circumstances, and having regard to the fact that under one of the orders of the Governor in Council, made under the War Measures Act, 1914, the family of the prisoner may go with him, I cannot perceive any justification for these proceedings without first applying to the Minister of Justice, even if there had been some power here to deal with the case, in the first instance.

These observations do not, of course, affect the prisoner's rights: if he be a British subject, he ought not to be detained

as an alien enemy, whatever other charge might be laid against him: but all that is for the consideration of the Minister of Justice first.

The application for the prisoner's discharge is dismissed; and his conditional remand is made absolute.

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[APPELLATE DIVISION.]

WOOD V. ANDERSON.

1914

Sept. 28.

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Feb. 1.

Sale of Animal—Warranty—Sale for Particular Purpose—Knowledge of Vendor—Express Warranty—Defect—Breach—Damages—Recovery of Purchase-price and Expenses less Actual Value of Animal—Return of Animal—Election of Vendor.

In an action for damages for the breach of an alleged warranty on the sale of a stallion, it was *held*, upon the evidence, affirming the findings of FALCONBRIDGE, C.J.K.B., the trial Judge, that the horse had a defect which existed from his birth, and which rendered him unfit for breeding purposes; that the defendant knew that the plaintiff was buying the horse for breeding purposes; and that there was an express as well as an implied warranty that he was fit for breeding purposes.

The warranty and breach being established, it was *held*, as to damages, varying the judgment of FALCONBRIDGE, C.J.K.B., that the plaintiff was entitled to recover the price paid for the horse, the expense of transporting him to the plaintiff's abode, and interest on the purchase-price; and, having offered to return the horse, the plaintiff was also entitled to recover all expenses necessarily caused by the horse lying on his hands until the horse could be sold, this being limited to a reasonable time; and from these sums should be deducted the actual value of the horse. The defendant, however, should be at liberty, at his election, to pay the plaintiff for the horse's keep and to take back the horse.

ACTION for damages for the breach of an alleged warranty on the sale by the defendant to the plaintiff of a Percheron stallion.

July 6 and 7, 1914. The action was tried by FALCONBRIDGE, C.J.K.B., without a jury, at Belleville.

W. N. Tilley and W. D. M. Shorey, for the plaintiff.

E. G. Porter, K.C., and W. Carnew, for the defendant.

September 28, 1914. FALCONBRIDGE, C.J.K.B.:—*Ponderantur testes, non numerantur*. Mere numerical comparison is not a consideration of decisive importance. *Vide* Starkie on Evidence, 4th ed., p. 832; Best on Evidence, 11th ed., p. 580.

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The Scotch authorities perhaps put the maxim better, as it is clearly not confined to verbal evidence. They say: *Testimonia ponderanda sunt, non numeranda*: Halk. Max. 174; Ersk. Inst., bk. IV., tit. 2, para. 26.

I find here the testimony of the plaintiff, backed by the clear and incisive evidence of John Bright, the president of the Clydesdale Association, and of H. S. Clapp, V.-S., more convincing than that of the cloud of witnesses called by the defendant.

There is also the evidence of Shelly and William G. Anderson, cousins of the defendant, as to the deformity of the horse before he was shipped.

I am quite satisfied, on the whole evidence, that the horse's defects existed from his birth, and were not the result of any improper treatment or want of proper treatment by the plaintiff.

The defendant must have known, and I find as a fact that he did know, that the plaintiff wanted the stallion for breeding purposes. I find that his defects would be perpetuated in at least a large percentage of his offspring, and that he was unfit for breeding purposes.

There was both an express and an implied warranty. They may co-exist unless they are inconsistent: Benjamin on Sale, 5th ed., p. 622; Oliphant's Law of Horses, 6th ed., pp. 119-121. There was breach of both. The horse was useless for the plaintiff's purposes, and he is entitled to recover back the purchase-money

	\$800.00
Freight	34.60
Insurance	15.00
Expenses at Maple Cut.....	12.00

\$861.60

I think the expected profit from the service of mares is too speculative and remote. And I think that the plaintiff ought to have minimised the other items which he claims, for board of horse, etc., by return of the horse or sale after notice.

Judgment for the plaintiff for \$861.60 and costs.

The defendant appealed from the judgment of FALCONBRIDGE, C.J.K.B.

January 19, 1915. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

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I. F. Hellmuth, K.C., and *E. G. Porter*, K.C., for the appellant, argued that the learned trial Judge should have given effect to the preponderance of evidence adduced on behalf of the defendant. Besides, there had been neither an express nor an implied warranty as to the fitness of the horse for breeding purposes. The plaintiff should have secured a warranty in order to protect himself: *Oliphant's Law of Horses*, 6th ed., p. 121; *County of Simcoe Agricultural Society v. Wade* (1855), 12 U.C.R. 614; *Hill v. Balls* (1857), 2 H. & N. 299, at p. 304. The plaintiff has not proved that the horse was unsound at the time of sale: *Bailey v. Forrest* (1845), 2 C. & K. 131. Mere malformation is not unsoundness: *Dickinson v. Follett* (1833), 1 Moo. & R. 299. Neither has it been successfully established that the malformation rendered the horse useless for breeding purposes. In assessing the damages, allowance should have been made for the actual value of the animal.

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W. N. Tilley and *W. D. M. Shorey*, for the plaintiff, respondent, contended that the judgment appealed from was right, for the reasons given therefor, and should be affirmed. The horse had been bought without inspection or opportunity for inspection, and had been paid for before shipment—the representations of the defendant as to the animal's fitness for the purposes for which it was required having been implicitly relied upon by the plaintiff. In these circumstances, the defendant was liable for breach of warranty. The findings of the learned trial Judge should not be disturbed. As to the measure of damages, reference was made to *Lamont v. Wenger* (1911), 22 O.L.R. 642.

Porter, in reply.

February 1. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment, dated the 28th September, 1914, which was directed to be entered by the Chief Justice of the King's Bench, after the trial of the action before him, sitting without a jury, at Belleville, on the 6th and 7th July, 1914.

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The action is brought to recover damages for the breach of an alleged warranty on the sale by the appellant to the respondent of a Percheron stallion, and the complaint of the respondent is, that one of the stallion's front feet is malformed, and that, in consequence of this malformation, he was entirely useless for breeding purposes, for which, to the knowledge of the appellant, he was purchased and intended to be used; and complaint is also made of the formation of the hind legs of the stallion, but that complaint was not, in the view of the Chief Justice, sustainable.

Apart from the question as to whether or not there was any warranty, and, if there was, the nature of it, which depends upon documentary evidence—the correspondence between the parties, by which the contract was constituted—the questions for decision were questions of fact as to which there was a direct conflict of testimony; and upon this conflicting testimony the learned Chief Justice found that the defect in the stallion's front foot existed from the stallion's birth, and was not, as the appellant contended, the result of any improper treatment or want of proper treatment of the respondent, and that this defect rendered the stallion unfit for breeding purposes. In coming to his conclusion the learned Chief Justice accepted the testimony of the respondent and his witnesses, although it was opposed to a large body of evidence adduced by the appellant, as well as to the testimony of the appellant himself. It is impossible for us to reverse these findings. There was evidence which, if believed, warranted them, and we cannot say that the findings were clearly wrong. The letters written on the 25th April and the 20th May, 1913, by the respondent, the first of them four days after the stallion reached Coulee, in the Province of Saskatchewan, to which point he had been shipped from the neighbourhood of Belleville, strongly support the contention of the respondent. It is true that the first of these letters is open to the observation made as to it by counsel for the appellant, which was that the complaint was not clearly directed to the defect of which the respondent complains and which has been found to have existed; but any force that there might have been in the observation is done away with by the second letter, which refers plainly to that defect.

That the appellant knew that the stallion was for breeding purposes is clear from the correspondence; and the law applicable is also clear, and is that: "If a contract be made to supply an article for a particular purpose, that purpose being the essential matter of the contract, so that it appears that the buyer relies on the seller's skill or judgment, then if the goods are of a description which it is in the course of the seller's business to supply, the seller is bound (whether he be the manufacturer or not) to supply an article reasonably fit for the purpose, and is considered as warranting that it is so. A sale for a particular purpose may be inferred from the nature and circumstances of the transaction:" Leake on Contracts, 6th ed., p. 267.

If it had been necessary for the respondent to establish an express warranty, he has, in our opinion, done so, for the statement of the appellant in the letter of December, 1912, that the horse was a fine young Percheron stallion, and that "he could get all the mares that he should have, never leave the stable," was in substance and effect a warranty that he was fit for breeding purposes.

The appellant also complains that no deduction was made from the purchase-price for the actual value of the horse. It was stated during the argument that the evidence shewed that the horse was of no value for any purpose, but it appears from an examination of the evidence that the statement was incorrect. The only evidence as to the value of the horse was the testimony of the respondent, who said that he was of no value to him (p. 8), and that he did not sell him because he could get nothing for him (p. 22), and the testimony of Gardhouse, a witness called for the respondent, who said that he would make a work-horse, but not a very good one. This evidence does not establish that the horse was worth nothing, but the contrary. What the respondent evidently meant, by stating that the horse was of no value to him, was, that he was of no value for breeding purposes, for which the respondent bought him, and his statement as to the reason for his not having sold the horse is not sufficient, in the absence of any statement that any effort was made to sell him; that no effort to sell was made is, I think, apparent from the correspondence, which shews that the respon-

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dent had it in mind to return the horse to the appellant unless some other arrangement should be come to with him.

The respondent is entitled as damages to the price paid for the horse and the expense of transporting him to Saskatchewan and interest on the purchase-price, all of which the learned Chief Justice allowed; and, having offered to return the horse, he is also entitled to recover all expenses necessarily caused by the horse lying on his hands until he could be sold, this being limited to a reasonable time; and from these sums there should be deducted the actual value of the horse: *Leake on Contracts*, 6th ed., p. 782; *Mayne on Damages*, 6th ed., p. 198; *Caswell v. Coare* (1809), 1 Taunt. 566; *Chesterman v. Lamb* (1834), 2 A. & E. 129; *Ellis v. Chinnock* (1835), 7 C. & P. 169.

The proper course, in these circumstances, is to direct a reference to ascertain what the horse is worth and the amount that should be allowed to the respondent for keeping him for a reasonable time until he could have been sold, unless the appellant elects to pay this latter amount and to take back the horse; and, if he so elects, the horse is to be given back to him upon request; and, if the parties are unable to agree as to the amount to be allowed for his keep, there will be a reference to ascertain it. In case of a reference, further directions and the costs of the reference will be reserved to be dealt with by a Judge of the High Court Division in Chambers. In *Caswell v. Coare*, where the purchase-price was recovered, it was directed that the horse should be redelivered to the defendant.

As success upon the appeal is divided, there will be no costs of it to either party.

[APPELLATE DIVISION.]

CARTER V. HICKS.

1915

Feb. 1.

Summary Judgment—Action for Money Demand—Specially Endorsed Writ of Summons—Affidavit of Defendant—Insufficiency—Rules 56, 57—Appeal from Judgment of District Court—Time—County Courts Act, sec. 44—Extension—Indulgence.

Where, in an action brought in a District Court to recover the price of wood sold and delivered by the plaintiff to the defendant, the affidavit filed by the defendant with his appearance stated that he had "a good defence on its merits" to the action, and that the quality of the wood supplied to him, for which the plaintiff claimed payment, was not such as the plaintiff agreed to deliver, and that the plaintiff did not deliver the amount of wood for which he claimed payment:—

Held, that the object of the requirement of Rule 56 that a defendant shall, besides deposing that he has a good defence on the merits, also in his affidavit shew "the nature of his defence, with the facts and circumstances which he deems entitle him to defend the action," is that the Court may see whether the facts and circumstances on which he relies afford an answer to the plaintiff's claim; if they do not, the affidavit is not a bar to the making of an order for summary judgment under Rule 57; and in this case, to make the affidavit a sufficient one, the defendant should have shewn what reduction he claimed in respect of the objection to the quality of the wood and the quantity that was not delivered.

Order for summary judgment made by the Judge of the District Court of the District of Temiskaming affirmed.

The order was made on the 10th October, 1914, and the defendant's appeal therefrom was set down on the 29th November, 1914, upon the fiat of a Judge, on the undertaking of the defendant to file all papers within one week from that date:—

Held, that, the papers not having been completed within the week allowed for filing them, the appeal was not set down within the time prescribed by sec. 44 of the County Courts Act, R.S.O. 1914, ch. 59; and the case was not one in which indulgence should be granted to the defendant.

APPEAL by the defendant from an order for summary judgment made by the Judge of the District Court of the District of Temiskaming, under Rule 57, in an action brought in that Court, to recover the price of certain pulpwood sold and delivered by the plaintiff to the defendant.

Rules 56 and 57 are in part as follows:—

56.—(1) Where the writ is specially endorsed the defendant shall with his appearance file an affidavit that he has a good defence upon the merits and shewing the nature of his defence, with the facts and circumstances which he deems entitle him to defend the action. . . .

57.—(1) Where the defendant appears to a writ specially endorsed and files the affidavit required by Rule 56, the plaintiff

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may cross-examine upon such affidavit and move for judgment, and if the Court is satisfied that the defendant has not a good defence to the action on the merits, or has not disclosed such facts as may be deemed sufficient to entitle him to defend the action, judgment may be given for the plaintiff. . . .

January 21. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

G. H. Sedgewick, for the appellant, argued that summary judgment should not have been given, as the defendant had filed a sufficient affidavit of merits under Rule 56.

H. D. Gamble, K.C., for the plaintiff, respondent, contended that, owing to the defendant's delay in launching his appeal, the appeal should not be allowed. The effect of the defendant's laches would be to throw the trial over to the April sittings, if the appeal should be allowed, whereas the plaintiff was entitled under the Rules to have the trial take place not later than December, 1914. Counsel contended also that the affidavit of merits was insufficient and did not really shew merits; and that certain letters of the defendant admitted that a balance was due to the plaintiff.

Sedgewick, in reply, denied that there had been delay by the defendant. In appeals from the County Court the statute governs and not the Rules. As the provisions of the County Courts Act applied, there had been no delay. As to the sufficiency of the affidavit of merits, the purpose of the new Rules was to ascertain whether or not there was any question to be tried, and to provide an easy method for the plaintiff to ascertain the defence without groping in the dark: *Langdon-Davies Motors Canada Limited v. Gasolelectric Motors Limited* (1914), 32 O.L.R. 84. The affidavit shewed that two issues were raised, one a question of quality, the other a question of quantity. In face of the defendant's affidavit, the Court could not, without a trial, determine the facts in issue or give a proper judgment in favour of the plaintiff: *Jacobs v. Booth's Distillery Co.* (1901), 85 L.T.R. 262. The plaintiff could have cross-examined the defendant on his affidavit under Rule 57. The defendant did not admit in any of his letters that he owed the amount claimed in the endorsement of the writ of summons.

February 1. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant from an order for summary judgment, dated the 10th October, 1914, made by the Judge of the District Court of the District of Temiskaming. The appeal is supported upon the proposition that the appellant had filed the affidavit required by Rule 56, and that, having done so, the order should not have been made.

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The affidavit, is not, in my opinion, a sufficient affidavit within the meaning of the Rule. In it the appellant deposes that he has “a good defence on its merits” to the action; that the quality of the pulpwood supplied to him, for which the respondent claims payment, was not such as he agreed to deliver to him; and that the respondent did not deliver to him the amount of the pulpwood for which the respondent claims payment.

The object of the requirement of the Rule that a defendant shall, besides deposing that he has a good defence on the merits, also in his affidavit shew “the nature of his defence, with the facts and circumstances which he deems entitle him to defend the action,” is plainly that the Court may see whether the facts and circumstances on which he relies afford an answer to the plaintiff’s claim; and, if they do not, the affidavit is not a bar to the making of an order for summary judgment.

It is plain from the appellant’s affidavit that he owes some part of the respondent’s claim, and it is quite consistent with the affidavit that he has no defence to the whole of it except \$10.

It was, in my opinion, necessary, to make the affidavit sufficient, that the appellant should have shewn what reduction he claimed in respect of the objection to the quality of wood and the quantity of wood, payment for which was claimed, that was not delivered.

For these reasons, I would dismiss the appeal with costs.

Having come to that conclusion it is unnecessary for us to determine the question raised by the respondent as to the competency of the appeal. The order appealed from was made on the 10th October, 1914, and the appeal was set down on the 29th November following, upon the fiat of my brother Hodgins, on the undertaking of the appellant “to file all papers

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within one week'' from that date. The certificate of the Judge of the District Court bears date the 8th December, 1914, and the papers were, therefore, not completed within the week allowed for filing them, and it follows from this that the appeal was not set down within the time prescribed by sec. 44 of the County Court Act, R.S.O. 1914, ch. 59.* No indulgence should be granted to the appellant. The letters which he wrote to the respondent and to the respondent's solicitor, which may be looked at at all events for the purpose of determining whether any indulgence should be granted, contain clear admissions of the respondent's claim, and repeated promises to pay it. Besides this, the result of the delay that has taken place has been to prevent the respondent from taking the case to trial at the December sittings of the District Court, as he might have done if the appeal had been brought on promptly, and the result of it had been adverse to him.

Appeal dismissed.

*44.—(1) The appeal shall be set down for argument at the first sittings of a Divisional Court which commences after the expiration of thirty days from the judgment, order or decision complained of.

(2) Subject to Rules of Court, a Divisional Court, or a Judge of the Supreme Court, notwithstanding that the Judge of the County or District Court has not certified the pleadings and other papers, or that they have not been filed in the Supreme Court, may extend the time for setting down the appeal or for giving notice of setting down or for doing any act or taking any proceeding in or in relation to the appeal; and may, if the certificate is incomplete or incorrect, direct the same to be amended or to be sent back to the Judge for amendment.

[APPELLATE DIVISION.]

LEUSHNER V. LINDEN.

1914

Dec. 8.

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Feb. 8.

Summary Judgment—Rules 56, 57—Specially Endorsed Writ of Summons—Affidavit Filed with Appearance—"Good Defence upon the Merits"—Defective Affidavit—Leave to Apply for Permission to File Proper Affidavit—Duty of Officer of Court Receiving Appearance.

The affidavit of the defendant required by Rule 56 must state "that he has a good defence upon the merits." An affidavit reading, "I have a good defence to this action," does not comply with the Rule.

Robinson v. Morris (1908), 15 O.L.R. 649, followed.

An order for summary judgment, under Rule 57, for the amount of the plaintiff's claim, as specially endorsed upon the writ of summons, was affirmed, subject to leave reserved to the defendant to make a substantive application for permission to file a proper affidavit.

Per RIDDELL, J.—Rule 56 requiring that the appearance shall not be received without an affidavit, and that the affidavit shall contain a statement that the defendant "has a good defence upon the merits," a Court officer should not receive an appearance unless the affidavit does contain that statement.

APPEAL by the defendant from a summary judgment granted by the Master in Chambers, under Rule 57, for the amount of the plaintiff's claim, as specially endorsed upon the writ of summons.

December 8, 1914. The appeal was heard by RIDDELL, J., in Chambers.

A. J. Russell Snow, K.C., for the defendant.

J. R. Roaf, for the plaintiff.

RIDDELL, J. (at the close of the argument) :—To a specially endorsed writ, the defendant entered an appearance, which has been set aside by the Master in Chambers on the merits. The defendant now appeals.

The Rule governing such appearances is perfectly clear and precise, and does not admit of misunderstanding: "Where the writ is specially endorsed the defendant shall with his appearance file an affidavit that he has a good defence upon the merits and shewing the nature of his defence, with the facts and circumstances which he deems entitle him to defend the action. . . . If the defendant fails to file an affidavit the appearance shall not be received. . . ." Rule 56 (1) and (4).

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By this Rule there are two prerequisites which must be found in the affidavit: (1) a statement "that he has a good defence upon the merits;" (2) the nature of the defence with its facts. The Rule has the force of a statute, and must be observed. The affidavit in this case reads, "I have a good defence to this action." That this is not a compliance with the Rule is conclusively decided by *Robinson v. Morris* (1908), 15 O.L.R. 649, in the King's Bench Division. The same point was decided in the Appellate Division by a Court of which I was a member—there, indeed, under the circumstances of the particular case, we gave the defendant leave to file a better affidavit *nunc pro tunc*.

Whatever the merits of the proposed defence may be, I do not go into them—they may be developed fully in an application, which I reserve leave to the defendant to make substantively, for permission to file a proper affidavit, etc.

The appeal will be dismissed with costs—the plaintiff undertakes not to proceed on his judgment until the 11th December, to enable such proposed motion to be made.

The attention of the defendant having been called to the defect of merit as well as of form, she must expect that any defence which she may set up will be closely scrutinised and rigidly dealt with.

The Rule being specific that the appearance shall not be received without an affidavit, and that the affidavit shall contain a statement that the defendant "has a good defence upon the merits," officers should not receive an appearance unless the affidavit does contain that statement. It is, perhaps, not to be expected that they will pass upon the sufficiency of the facts alleged to constitute a valid defence: but they may and should see that the affidavit is not defective in form.

The defendant appealed from the order of RIDDELL, J.

February 8, 1915. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A.

G. F. Dyke, for the appellant.

J. R. Roaf, for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

[IN CHAMBERS.]

TRUSTS AND GUARANTEE CO. v. SMITH.

1915

Feb. 10.

Discovery—Examination of Person for whose Immediate Benefit Action Prosecuted—Action for Benefit of Intestate's Estate—Interest of Next of Kin—Rule 334—Affidavit.

In an action by the administrators of the estate of a deceased intestate to recover from the defendant money and property in his hands alleged to form part of the estate of the deceased, it was *held*, that a sister of the intestate, who, it was said, was entitled to one-third of his estate, was not a person for whose immediate benefit the action was prosecuted, and was not, therefore, examinable by the defendant, for discovery under Rule 334. If she should receive any benefit from the action, it would be received mediately and not immediately.

Stow v. Currie (1909), 14 O.W.R. 223, 224, followed.

Macdonald v. Norwich Union Insurance Co. (1884), 10 P.R. 462, and *Garland v. Clarkson* (1905), 9 O.L.R. 281, distinguished.

It was *held*, also, that the affidavit filed in support of an application for an order for the examination of the sister was insufficient, because it did not state that the action was prosecuted for her immediate benefit, but only that she would derive material advantage from the plaintiffs' success: the affidavit should follow the language of the Rule.

APPEAL by the plaintiffs from an order of a Local Judge of the Supreme Court, under Rule 334, allowing the defendant to examine one Mary Ann Elizabeth Morton for discovery.

February 9. The appeal was heard by RIDDELL, J., in Chambers.

H. S. White, for the plaintiffs.

G. M. Willoughby, for the defendant.

February 10. RIDDELL, J.:—This is an action by the plaintiffs as administrators of the estate of William Webb, late of the township of Chatham. The plaintiffs by their statement of claim allege that the defendant, a farmer of the same township, received from Webb, as custodian for him, a cheque for \$3,650 and a sum of money amounting to \$3,600, in all (after deducting discount on the cheque when cashed) \$7,247.45—and that the defendant, after the death of Webb, took possession of a considerable amount of property which Webb owned at the time of his death. They claim judgment for the sum of \$7,247.45 and interest and an accounting for the other property, etc. The defendant claims a gift of the \$7,247.45, and expresses will-

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ingness to account for such property as he admits came to his hands. He also sets up, but apparently claims no relief from, an agreement by Webb to pay for board, etc.—the plaintiffs are willing to pay.

The case being at issue, the defendant made an application before the Local Judge at Chatham for an order under Rule 334, to examine Mary Ann Elizabeth Morton for discovery. He supports the motion by an affidavit of his own wherein he sets out that Mrs. Morton appears by the papers filed by the plaintiffs (I presume in the Surrogate Court) to be a sister of the deceased; “that the defendant . . . would derive material advantage from the examination *vivâ voce* of the said Mary Ann Elizabeth Morton, who, if the plaintiffs were to succeed, would derive material advantage from the plaintiffs’ success;” and that the plaintiffs’ solicitor refused to produce her for such examination.

On this material the learned Local Judge made an order accordingly—and the plaintiffs appeal.

There are several grounds of objection to this order, but I deal with only those which will now be referred to. The Rule says: “A person for whose immediate benefit an action is prosecuted . . . may without order be examined for discovery”—so that an order for such examination is not necessary in a case coming within the Rule.

But the person so made examinable is one for whose immediate benefit the action is prosecuted—here the affidavit says only that Mrs. Morton “would derive material advantage from the plaintiffs’ success.”

In *Leushner v. Linden* (1914), 7 O.W.N. 456, affirmed in the Appellate Division on the 8th February, 1915 (now reported ante 153), attention was called to the necessity of using in an affidavit the language of the Rule. If the defendant had intended to swear that the action was prosecuted for Mrs. Morton’s immediate benefit, he should have done so; material advantage may or may not be immediate benefit. If Mrs. Morton were the endorser for the deceased on a note outstanding and unpaid, she would derive material advantage from the plaintiffs’ receiving in this action money to pay the note and

so relieve her—but no one could say that the benefit was immediate. She seems to have a nephew and some nieces, children of Benjamin Webb, a brother (now deceased) of hers and of the decedent. If they get some money from the success of the plaintiffs in this action, they may give her some or pay for her support—a material advantage, but not an immediate benefit.

It is argued, however, that, even if the affidavit be defective, it is perfected by the affidavit filed in behalf of the plaintiffs in the Surrogate Court on application for the letters of administration. That sets out, in exhibit C, that Mrs. Morton, as sister of the deceased, will be entitled to one-third of the estate.

As to this, *non constat* that she will receive anything—the deceased may have had debts to the amount of all the money received; she may have assigned any claim she might have had, etc., etc.

But I desire to put the judgment upon the broad ground that she is not in any event one for whose immediate benefit the action is prosecuted.

In *Macdonald v. Norwich Union Insurance Co.* (1884), 10 P.R. 462, Mr. Justice Rose held, under a similar Rule, that the assignor for the benefit of creditors was examinable in an action by the assignee. In *Garland v. Clarkson* (1905), 9 O.L.R. 281, it was said by the Chancellor (p. 282) that this decision was given by Rose, J. “after conference with his colleagues,” and the Divisional Court followed the previous decision (Meredith, J., dissenting). It is not open to me to reverse that Divisional Court decision, nor is it necessary to express an opinion as to its correctness. It must, however, be plain that the assignor must derive a benefit from the money obtained in litigation by his assignee, either by payment of his debts (wholly or *pro tanto*) or by receiving the money himself. Either may perhaps be fairly called immediate benefit—the “estate” is immediately benefited, and the “estate” is his.

The case of a beneficiary in intestacy is quite different—the estate is the estate of the deceased: that indeed is immediately benefited, but the next of kin receives no immediate benefit. All the benefit the next of kin receives is received mediately and

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not immediately. This was the opinion of the Chief Justice of the Exchequer Division in *Stow v. Currie* (1909), 14 O.W.R. 223, at p. 224, where he mentioned the case of an action brought by an executor for the benefit of an estate, where it is sought to examine a third person who is to share in the fruits of the action. It is true that he also places in the same category an action by an assignee for the benefit of creditors, but the class of persons he considers as non-examinable under the Rule includes the creditors, but clearly not the assignor. There is no inconsistency between this case and those already cited.

I do not think that Mrs. Morton is one for whose immediate benefit the action is prosecuted: and allow the appeal with costs here and below to the plaintiffs in any event.

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Life Insurance—Proof of Death of Insured—Waiver—Authority of Chief Officer of Society—Presumption of Death—Absence of Seven Years—Evidence—New Trial.

The plaintiff, the beneficiary under a certificate or policy of insurance upon the life of her husband, issued by the defendants in 1905, by which the sum of \$1,000 was made payable to her within thirty days after proof of his death and of the manner of its occurrence, brought this action to recover the sum named, alleging that her husband had disappeared on the 9th July, 1907, and had not since been heard of or from by her, although she had endeavoured to find him, and that on and after the 9th July, 1914, he must be presumed to be dead:—

Held, that the Chief Ranger of the defendants, by reason of the duty imposed upon him by the defendants' constitution to "see that justice is done to all parties," had authority to waive the production of formal proof of the death of the plaintiff's husband, and had done so by his correspondence with the plaintiff's solicitors.

Judgment of BRITTON, J., the trial Judge, upon that branch of the case, affirmed.

But *held*, without saying that the trial Judge was wrong in finding that the presumption existed that the insured was dead on the 9th July, 1914, that the plaintiff had not at the trial adduced the testimony of all persons in Canada who might reasonably have been expected to have heard from the insured; and that there should be a new trial.

ACTION to recover \$1,000 upon a certificate or policy of insurance upon the life of Carl Linke.

The action was tried by BRITTON, J., without a jury, at Berlin.

E. P. Clement, K.C., for the plaintiff.

G. H. Watson, K.C., for the defendants.

December 21, 1914. BRITTON, J.:—The plaintiff was the wife of one Carl Linke, and she alleges that her husband must be presumed to be dead. She brings this action to recover from the defendants \$1,000 upon the certificate or policy of insurance No. 96838, issued by the defendants on the 18th November, 1905, by which certificate the said sum of \$1,000 was made payable to the plaintiff within thirty days after proof of the death of the said Carl Linke and of the manner of the occurrence, together with such information pertaining to the cause of death and circumstances connected therewith as might be required.

Carl Linke and the plaintiff were married to each other in

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1904. On or about the 8th or 9th day of July, 1907, the said Carl Linke left the plaintiff, and she has never seen him or heard from him since.

During the years intervening since the 9th July, 1907, the plaintiff has paid all the fees, dues, and assessments upon the said certificate, to keep it alive and current. After the expiration of seven years from the 9th day of July, 1907, the plaintiff made application to the defendants for payment of the insurance due upon the certificate mentioned, and payment was refused.

The defendants rest their defence upon two grounds: first, no formal proof of death, giving the time, the occasion, and the place of death, and the circumstances connected with it; second, no sufficient proof, upon this trial, of the death of the husband of the plaintiff.

The plaintiff's claim is that after the 9th July, 1914, because of the absence of her husband for over seven years without having been heard from, the presumption has arisen that on the last-mentioned day he was dead, and that was made known to the defendants, but they continued in their refusal to recognise the plaintiff's claim. The plaintiff then placed the matter in the hands of Clement & Clement, her solicitors. Correspondence followed—but the only letters that I deem material are the following:—

“31st August, 1914.

“The Secretary, High Court,

“Canadian Order of Foresters,

“Brantford, Ont.

“Dear Sir:—

“Re your certificate No. 96838, issued to Carl Linke, formerly a member of Court Berlin No. 72:—

“We have been consulted by Mrs. Annie Linke, the wife of the insured and the beneficiary under your certificate, with reference to this certificate.

“We understand that you have been communicated with, but that you decline to recognise the claim made by Mrs. Linke. What she says is that she has not heard from her husband since June 7th, 1907, and that he has not been heard from by any one so

far as she knows from that time. What became of him at that time she is utterly unable to say, but, as you are aware, after seven years' absence, unheard of, he is presumed to be dead, and we must ask you, therefore, to forward us the usual and necessary papers for making a claim under the certificate.

"The members of your local court must be very well aware of all the circumstances connected with this case, and it appears to us that if you would ask them to make a report to you of the facts, you might save your Order the costs of proceedings to establish the claim.

"Yours truly

"Clement & Clement."

The defendants, after delay in getting the person with full authority, replied:—

"Perth, Ont., Sept. 17th, 1914.

"Messrs. Clement & Clement, Barristers., etc., Berlin, Ont.

"Dear Sirs:—

"With further reference to your letter of the 31st of August with reference to the insurance certificate of Carl Linke.

"We have had so many disappearance claims that have proved fraudulent that, as a matter of general policy, we expect the death to be established to the satisfaction of a court of competent jurisdiction. We do not obligate ourselves to pay insurance after seven years' membership or after seven years' absence. If the Courts decide this brother is dead, we will have no alternative but to pay, but, in the meantime, we cannot send you any claim papers.

"Yours truly

"J. A. Stewart."

The defendants emphatically denied the plaintiff's right to recover, and put forward, as the only issue, that of the death of Carl Linke, the insured.

This is a case in which the defendants might, if in any case, waive the formal proofs of the occasion, time, and place of death. The plaintiff could not, nor could any one on her behalf, give them. Such formal proofs are inconsistent with the claim which is founded upon the presumption of the death of the insured.

I find that the defendants have waived the requirements of

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formal proof ordinarily required before action in cases arising when death is witnessed or can be proved by a person or persons having knowledge of it.

The plaintiff's case, as I have said, is based upon the presumption of the death of her husband.

The rule is as laid down by Lawson in his work on the Law of Presumptive Evidence, 2nd ed., p. 251: "An absentee shewn not to have been heard of for seven years by persons who, if he had been alive, would naturally have heard of him, is presumed to have been alive until the expiry of such seven years, and to have died at the end of that term."

No two cases are exactly alike in respect of disappearance and absence—on which the presumption is founded. The facts in no other case that I have read prevent me from coming to a different conclusion from the one arrived at in another case.

The facts in this case, shortly and in part, are that Linke and the present plaintiff were married at Berlin, Ontario, in 1904. Two children, a boy and a girl, were born to them in marriage, and are living. Husband and wife lived together as boarders in the house of the mother of the plaintiff at Berlin until the 8th or 9th July, 1907, when the husband stated his intention to go to Preston—a town only a short distance from Berlin. He left, and from that time has not been seen or heard from by the plaintiff or by any person known to her, or from whom she could get information. Linke was well-known in Berlin—to his brother members of the Foresters' Lodge—as well as to his relations by marriage. The brother-in-law caused an advertisement to be inserted in the Shoe-workers' Journal, a paper published in Boston in the interest of that class of workmen of which class the deceased was one. Linke's likeness was also published. No information or response was received.

The plaintiff, by her brother-in-law, inquired by letter. Counsel for the defendants objected to the replies received, but the evidence was that no word came from any one in reference to having seen or heard from Linke during the period named. The plaintiff's father died about thirteen years ago. Her mother is living. The plaintiff's children are with her.

There was no ill-feeling between Linke and his wife, or his

wife's family; and, if word had come to any one in Berlin or Preston about Linke, the plaintiff would be likely to hear. She did not hear.

In this matter the defendants could have taken proceedings under the Insurance Act, R.S.O. 1914, ch. 183, sec. 165, subsecs. 4, 5, but they did not do so.

I find upon the facts that there exists the presumption that Carl Linke was dead on the 9th July, 1914.

There should be judgment for the plaintiff for \$1,000, with interest from the 22nd September, 1914, at five per cent. per annum, with costs.

The defendants appealed from the judgment of BRITTON, J.

February 15, 1915. The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

G. H. Watson, K.C., for the appellants. The plaintiff has not furnished the necessary formal proofs of death. The learned trial Judge has found that the defendants have waived the production of these proofs, but in such a case there is no power to waive such production: *Commercial Union Assurance Co. v. Margeson* (1899), 29 S.C.R. 601, following *Atlas Assurance Co. v. Brownell* (1899), 29 S.C.R. 537, and *Employers' Liability Assurance Corporation v. Taylor* (1898), 29 S.C.R. 104. Reference was made to the rules and by-laws of the defendants, which are made a part of the contract, and on which they are bound to act. This is not a mere technicality, but involves a matter of principle. The defendants also deny liability on the ground that, apart from the necessity for formal proofs, there is no sufficient evidence of the death of Carl Linke. The inquiries made have not been directed to the proper quarters, although the evidence shews where they should have been made. In the case of *Duffield v. Mutual Life Insurance Co. of New York* (1914), 32 O.L.R. 299, decided in this Division, every reasonable means of inquiry had been exhausted, and the sole issue was under the statute R.S.O. 1914, ch. 183, sec. 165. Reference was also made to *Somerville v. Aetna Life Insurance Co. of Hartford* (1910), 21 O.L.R. 276, per Magee, J., at pp. 286, 287, where he refers to *Watson v. England* (1844), 14 Sim. 28, and *Prudential Assurance Co. v.*

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Edmonds (1877), 2 App. Cas. 487; *Doyle v. City of Glasgow Assurance Co.* (1884), 50 L.T.R. 323; Lawson on the Law of Presumptive Evidence, 2nd ed., rules 45 and 46, on pp. 267, 268; *Re Dancey and Ancient Order of United Workmen* (1908), 11 O.W.R. 833, 12 O.W.R. 417; *Re Ancient Order of United Workmen and Marshall* (1909), 18 O.L.R. 129, 135; *Johnston v. Dominion of Canada Guarantee, etc., Co.* (1908), 17 O.L.R. 462; *Re Coots* (1910), 1 O.W.N. 807; *Re Oag and Order of Canadian Home Circles* (1913), 4 O.W.N. 643; *Wright v. Ancient Order of United Workmen* (1913), 5 O.W.N. 445.

E. P. Clement, K.C., for the respondent, plaintiff.

FALCONBRIDGE, C.J.K.B. (at the conclusion of the argument for the appellant) :—Now, Mr. Clement, there is one branch of this case, that is, as to the plaintiff not having filed proofs of claim, as to which we do not think it necessary to hear you.

The firm of Clement & Clement, the plaintiff's solicitors, wrote to the Secretary of the High Court on the 31st August, 1914, saying that they had been consulted by the plaintiff, the wife of Carl Linke, and proceeding as follows: "We understand that you have been communicated with, but that you decline to recognise the claim made by Mrs. Linke. What she says is that she has not heard from her husband since June 7th, 1907, and that he has not been heard from by any one so far as she knows from that time. What became of him at that time she is utterly unable to say, but, as you are aware, after seven years' absence, unheard of, he is presumed to be dead, and we must ask you, therefore, to forward us the usual and necessary papers for making a claim under the certificate. The members of your local court must be very well aware of all the circumstances connected with this case. . . ."

To that letter the High Secretary replied on the 1st September, 1914, stating that the correspondence had been referred to the High Chief Ranger at his request, and again on the 8th September the stenographer writes that Mr. Stewart, the High Chief Ranger, is away from home, "but on his return about the 12th instant your letter will receive his attention."

Then we come to the letter of the High Chief Ranger of the

17th September, 1914, in which he says: "With further reference to your letter of the 31st of August with reference to the insurance certificate of Carle Linke. We have had so many disappearance claims that have proved fraudulent that, as a matter of general policy, we expect the death to be established to the satisfaction of a court of competent jurisdiction. We do not obligate ourselves to pay insurance after seven years' membership or after seven years' absence. If the Courts decide this brother is dead, we will have no alternative but to pay, but, in the meantime, we cannot send you any claim papers."

We are of opinion that that constitutes a clear waiver of the filing of such papers, subject to the question of the authority of the High Chief Ranger.

Under some of the insurance cases the local agent and the adjuster were held not to be authorised to make the waiver. But the duties of the Chief Ranger, as laid down on p. 46, sec. 11, of the constitution, are as follows: "The Chief Ranger shall preside at all meetings of the court, preserve order and decorum, . . . sign all orders for the payment of moneys, after they have been voted by the court . . . see that justice is done to all parties, and that the by-laws of the court are strictly and impartially enforced."

The authority to see that justice be done to all parties included authority to make this waiver.

Now that point we have decided; but, Mr. Clement, you have heard the contention raised by Mr. Watson as to the other point in the case. We think at present that, while, of course, it is impossible to bring witnesses from Germany, the plaintiff has not exhausted the evidence that is obtainable here.

FALCONBRIDGE, C.J.K.B. (after hearing counsel for the respondent):—We are all of opinion that, without stating that the learned trial Judge is wrong, we should have the evidence of friends in this country who might reasonably have been expected to have heard from the insured.

For that purpose we order a new trial at the sittings commencing on the 13th April, and we think that, under all the circumstances of the case, the costs should be in the cause unless

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the trial Judge should otherwise order. Of course, if the parties choose, they may use the evidence already given, instead of taking it all *de novo*.

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Feb. 18

Municipal Corporation—Inquiry into Affairs of—Rights of Residents—Newspaper Reporters—Statutory Rights—Municipal Act, R.S.O. 1914, ch. 192, secs. 219, 237—Declaratory Judgment.

Municipalities in Ontario are not an evolution from the common law municipal corporations, but are the product of statutory enactments. An inhabitant or person, in regard to the affairs of a municipality, has no right of examination or inquiry except such as is expressly or by implication given by statute.

Tenby Corporation v. Mason, [1908] 1 Ch. 457, applied and followed.

Williams v. Mayor, etc., of Manchester (1897), 13 Times L.R. 299, distinguished.

The judgment of MIDDLETON, J., declaring that the reporters for the newspaper published by the plaintiff company in the city of O. were entitled at reasonable times to access to the offices of the city clerk for the purposes pointed out by sec. 219 of the Municipal Act, R.S.O. 1914, ch. 192, and also entitled to access to the proper office for the purpose of inspecting the statement of the auditors under sec. 237 of the Municipal Act, also for the purpose of obtaining the inspection of any records or documents the inspection of which is expressly authorised by the Municipal Act or by any other statute, and were entitled to inquire, at reasonable times, from the heads of municipal departments, whether they had any information which they were ready to give for publication, but were not entitled to remain in any municipal office when requested, by the officer in charge thereof, to retire, was affirmed.

Per MIDDLETON, J.:—A reporter, as a reporter, has no particular rights or privileges; he is not entitled to information save that which is open to any member of the public. The defendant, the mayor of the city, had the right to require the civic officials to give out no information beyond that pointed out by the statute, without his approval and sanction; but in excluding reporters from the city hall, the defendant went too far. As representatives of the newspaper company and as ratepayers and residents of the city, the reporters had the right to enter the city hall for the purpose of obtaining such information as they were lawfully entitled to, and for the purpose of seeking information which might be voluntarily given to them by those in charge of municipal affairs.

ACTION for a declaration of right and an injunction in the terms set forth below.

December 7, 1914. The action was tried by MIDDLETON, J., without a jury, at Ottawa.

G. F. Henderson, K.C., for the plaintiff company.

T. A. Beament, for the defendant.

January 7, 1915. MIDDLETON, J.:—The plaintiff company owns and publishes a newspaper called "The Evening Journal," at Ottawa. The defendant is the mayor of that city. This action is brought to obtain a declaration that the reporters employed by the plaintiff company are entitled at reasonable times to access to the offices of the city clerk and to the offices of other heads of departments at the city hall of the city of Ottawa for the purpose of obtaining information respecting the proceedings of the city council and of inspecting the books and records kept by the city clerk and for the purpose of obtaining information as to the conduct of the affairs of the city; and for an injunction restraining the defendant from interfering with the reporters in obtaining such access and information.

The defendant was elected mayor of the city at the beginning of the year 1914, and on the 23rd April, 1914, he issued a circular addressed to the heads of departments as follows:—

"The mayor desires it to be understood that, in his opinion, the giving of interviews or information or the writing of letters to the newspapers by officials is incompatible with the efficiency of the civic service, and expects that the same will be discontinued.

"Newspaper reporters will not be permitted to have access to officials or admission to their offices during business hours.

"If any official has any information to impart or complaint to make, he must be content to confide it to the mayor or to the council.

"The mayor will regard the non-observance of this rule by any official as sufficient ground for suspension."

This was followed by circulars dated the 24th June and 21st October respectively. That of the 24th June is as follows:—

"Heads of Departments:

"The mayor wishes it to be understood that he expects that no appointment will be made to any position of a higher grade than that of a day labourer without consultation with him.

"The mayor also wishes it to be understood that there is to be no relaxation of the rule prohibiting officials from being interviewed by or giving information to the representatives of the newspapers."

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The circular of the 21st October reads thus:—

“Heads of Departments:

“The mayor desires it to be understood that where an alderman is at the same time a newspaper reporter, he is to be regarded and treated as a reporter, and the mayor’s order of the 23rd April last is to be understood as applying to him.”

Before the bringing of this action—the date is not important—a notice was affixed to the doors of the city hall, thus; “Newspaper reporters not admitted. By order of the mayor.”

The police officer placed in charge of the building during the day was instructed by the mayor to eject reporters disregarding this notice.

In October, notwithstanding this warning, reporters sought interviews with the mayor, and, persisting, they were ejected.

Much that was done by the reporters appears to have been absolutely without justification. There was a more or less deliberate attempt made persistently to annoy the defendant.

No public official is bound to submit to an interview at the hands of a newspaper against his will, and a persistent attempt on the part of reporters to interview the mayor and to catechise him with reference to his conduct of public affairs is not seriously attempted to be justified.

A reporter, as a reporter, has no particular rights or privileges. He is not entitled to information save that which is open to any member of the public.

The function of the press in gathering information for the public, so as to enable public affairs to be intelligently discussed, is obviously of the greatest importance. Those in charge of public business may well, as a matter of courtesy, afford special privileges to representatives of the press, and may well seek its aid in the education of the public mind by availing themselves of its readiness to disseminate information. All this must rest on goodwill and mutual confidence, and this happily is generally found sufficient to insure adequate information reaching the public. When, unfortunately, this happy relation does not exist, and there is a tendency on the one side to heckle and annoy, and an inclination on the other side to be curt and perhaps almost churlish, it will probably be found that the Courts can afford

no real redress. Many of the practical affairs of life must depend on good taste and good manners rather than on strict definitions of right emanating from the Courts.

According to the evidence of the mayor, when he took office he found an entirely unsatisfactory state of affairs existing. The newspaper reporters had the run of the city hall. City officials were interviewed almost daily with regard to questions of policy and matters of administration. Reports and documents were given to the newspapers for publication before being submitted to the council or its committees. Subordinate officials were airing their views in the newspapers as to the proper and probable municipal action. Chaos reigned supreme. All order and discipline were forgotten. The newspapers were endeavouring to run the municipality, and civic officials were aiding and abetting in this state of affairs.

In discussing the matter with the heads of the departments, and pointing out how unsatisfactory the situation was, the mayor was asked by the officials to take such steps as would keep these too enterprising reporters in their proper position. The result was the issuing of these circular letters, not only as indicating the mayor's opinion as to the proper conduct of the civic officials, but for the purpose of affording them some weapon to protect themselves against the importunity of the reporters.

In all this, I think, the mayor was amply justified in adopting the course he did. His conduct, however, was not unnaturally resented, and then he was made the victim of a good deal of persecution at the hands of the newspaper and its representatives. Attempts to compel the mayor to discuss civic affairs, and the items referring to his refusal, under the heading "Our Daily Chat with the Mayor," cannot be justified.

In excluding the reporters from the city hall, the mayor, I think, went too far. As representatives of the newspaper company, as ratepayers of the city, and as residents of the city, the reporters had, I think, the right to enter the city hall for the purpose of obtaining such information as they were lawfully entitled to, and for the purpose of seeking information which might be voluntarily given to them by those in charge of municipal affairs.

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A motion was made for an interim injunction on the 31st October, and I then made an interim order, which I suggested to the parties the desirability of considering as a basis of a final settlement of the action. I then restrained any interference with the plaintiff's reporters in obtaining any information to which they were entitled under the provisions of the Municipal Act, and provided that the order should not justify any reporter remaining in the office of any official when that official requested him to retire.

This arrangement has not been found either workable or satisfactory, and I have now to deal with the matter according to which I find to be the strict legal rights of those concerned.

The Municipal Act, R.S.O. 1914, ch. 192, sec. 219, provides that any person has the right to inspect the books and documents mentioned in sec. 218, which it is the duty of the clerk to keep, and the minutes and proceedings of any committee of the council, whether the acts of the committee have been adopted or not, and the assessment rolls, voters' lists, etc. By sec. 237, auditors are required to prepare certain statements of receipts and expenditures, and a resident of the municipality has the right to inspect these. No doubt, scattered throughout the Municipal Act and other Acts, there are other records and documents which are open to inspection. All these, it is admitted, the newspaper, through its reporters, has a right to inspect. Beyond this, the giving of information rests entirely in the discretion of the municipal authorities.

The case of *Tenby Corporation v. Mason*, [1908] 1 Ch. 457, supplies the principles which must guide me. In that case the municipal corporation sought an injunction restraining the defendant, a representative of a newspaper, from intruding, without permission of the council, upon meetings held in the council chamber. There was not in the constituting statute any provision requiring the meetings of the council to be held in public. The council did not object to the presence of reporters so long as the report of the proceedings was substantially accurate. It was claimed that the defendant's reports were erroneous. Kekewich, J., before whom the action was tried, says that the defendant put his claim of right to be present at the meetings in three

ways: first, as a burgess; secondly, as the representative of the newspaper; and, thirdly, as one of the public, claiming that the meetings were necessarily public meetings. With reference to the claim of right as the representative of a newspaper, the learned Judge said: "It is extremely difficult to understand the foundation of this claim, but it was seriously argued, and must therefore be noticed. It was said that it has been the practice of the council to admit reporters, and that is true, but I fail to see how any right can be rested on that. Next, attention was called to the resolutions of the council in favour of the admission of reporters, which were relied on as equivalent to standing orders, to the benefit of which the defendant says he is entitled. The answer is that the council which makes can also unmake standing orders, and that in the meantime they, however binding on the council, cannot confer rights on strangers. It seems to have been the practice to give notice to the newspapers of the borough, not only of intended meetings of the council, but of the business to be transacted thereat, and it is admitted that this has been done in order to assist the newspapers to report the proceedings, and for that purpose to send representatives to the meetings. Such a representative might well be surprised if, on attending a meeting to which he had been thus invited, he were refused admission. But surely the council which issued the invitation is entitled to withdraw it. There is no room for contract, and without contract I do not see how any right can be established."

The claim of right to be present as a member of the public, it is said, must depend upon the statute. The statute does not direct the meetings to be held in public. In the absence of any such direction, there is no obligation to hold the meetings in public.

The *Tenby* case was appealed, and upon appeal the judgment was affirmed; the appellate Judges adopting the judgment appealed from in its entirety. Cozens Hardy, M.R., adds this: "What is this council? It is the governing body of a statutory corporation, a municipal corporation which derives its existence solely from statute. Is there any provision in the Municipal Corporations Act conferring a right upon any member of the

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public to attend? Admittedly there is no express provision. Can any such rights be inferred from any of the language used in that section? I think plainly not" (p. 466). And on p. 467: "I can see no ground whatever for implying or inferring, as against the council of a municipal corporation, a right which is not expressed anywhere, which has never, so far as I know, been claimed or asserted before, and which is not supported by a fragment of judicial authority." Lord Justice Buckley points out the obvious distinction between proceedings before a Court of Justice or any similar tribunal, where it is a fundamental principle that all proceedings must be in public, and the proceedings of a municipal council. He adds (p. 469): "It may be in the interest of the body governed that the deliberations shall not be held in public. The persons whose duty it is to determine questions of policy and questions of government ought to be placed in such a position that they can express their views freely, without risk of their becoming communicated to the public, to the disadvantage perhaps of the body whose affairs they have to govern. *Primâ facie*, the constituent has no right of access to the meetings of the deliberative body."

That case, while defining the principles applicable, differs from the case in hand, because here there has been no attempt whatever to exclude reporters from the meetings of the council; but the underlying principle is the same. In the administration of the public affairs of the municipality there must be many things that cannot be transacted in public, and there must be many other things which cannot be placed before the public prematurely, if the public interests are to be properly served. Those charged with the administration of public affairs are answerable to the electorate. If their constituents do not receive due information as to how the stewardship of their representative is being administered, the result will be ascertained at the polls. The Court cannot be called upon to compel the municipal officers to give to the newspapers any information beyond that which the Municipal Act prescribes. The mayor, as the head of the corporation, has the right to require the civic officials to give out no information beyond that pointed out by the statute, without his approval and sanction. If his views do not agree

with those of the council, the council can overrule his action ; but the matter is essentially a domestic one, with which the Courts have no concern.

Because the mayor went too far in excluding reporters from the municipal buildings, some injunction must be granted ; and I think it may well be framed in this way : There should be a declaration that the plaintiff's reporters are entitled at reasonable times to access to the offices of the city clerk for the purposes pointed out by sec. 219 of the Municipal Act, and also entitled to access to the proper office for the purpose of inspecting the statement of the auditors under sec. 237 of the Municipal Act, also for the purpose of obtaining the inspection of any records or documents the inspection of which is expressly authorised by the Municipal Act or by any other statute. It should also be declared that the reporters are entitled to inquire, at reasonable times, from the heads of the municipal departments, whether such officers have any information they are ready to give for publication ; but this provision is not to authorise any reporter remaining in any municipal office when requested, by the officer in charge thereof, to retire.

In view of the divided success, the case is not one for costs.

The judgment as settled and issued was as follows :—

This Court doth declare that the plaintiff's reporters are entitled at reasonable times to access to the offices of the city clerk of the City of Ottawa for the purposes pointed out by section 219 of the Municipal Act, and are also entitled to access to the proper office for the purpose of inspecting the statement of the auditors of the Municipal Corporation of the City of Ottawa under section 237 of the Municipal Act, and are also entitled to access to other offices in the city hall of the said city for the purpose of obtaining the inspection of any records or documents, the inspection of which is expressly authorised by the Municipal Act or any other statute, and that the said reporters are entitled to inquire, at reasonable times, from the heads of municipal departments, whether such officers have any information they are ready to give for publication, but this provision is not to auth-

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orise any reporter remaining in any municipal office when requested to retire by the officer in charge thereof.

And this Court doth not see fit to make any order as to the costs of this action.

The plaintiff company appealed from this judgment.

February 18. The appeal was heard by FALCONBRIDGE, C.J. K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

G. F. Henderson, K.C., and *H. F. Parkinson*, for the appellant company, argued that the case of *Tenby Corporation v. Mason*, [1908] 1 Ch. 457, relied on by the defendant and cited in the judgment of the learned trial Judge, was distinguishable from the case at bar, and referred to *Williams v. Mayor, etc., of Manchester* (1897), 13 Times L.R. 299, as an authority for the plaintiff company's position. They also referred to Biggar's Municipal Manual, note (a) on pp. 294, 295, and to Dillon on Municipal Corporations, 5th ed., vol. 2, para. 560, at p. 886, as to the right to inspect corporate documents and papers. The defendant's action was taken by himself personally, and not, as it should have been, by the council and authorised by by-law. The right claimed by the plaintiff company is not confined to the precise terms of the statute, and has a basis in the common law.

A. J. Russell Snow, K.C., for the defendant, was not called upon.

FALCONBRIDGE, C.J.K.B (at the conclusion of the argument for the appellant company):—Bearing in mind that this appeal is taken from the formal judgment, and not from the reasons therefor, there is no necessity, we are all agreed, for reserving judgment.

The only point, we consider, is the right of an "inhabitant" or "person" to examine into the affairs of the city. We are of opinion that no rights exist except such as are expressly or by implication given by the statute. Our municipalities are in no way an evolution from the common law municipal corporations, but are the product of statutory enactments, and in this respect differ from them. Some account of this origin may be seen in

Biggar's Municipal Manual, McEvoy's The Ontario Township, and a series of articles on Early Legislation and Legislators in Upper Canada in 33 C.L.T. All reasoning, therefore, based upon the common law rights of the parties falls to the ground.

In the case of *Tenby Corporation v. Mason*, [1908] 1 Ch. 457, at p. 462, Mr. Justice Kekewich says "Thirdly, the defendant claims to be entitled to attend the meetings of the council as one of the public, that is, he alleges that they are necessarily public meetings. I pass over without further notice the evidence that the door leading to the council room has remained open during the time of meeting, and there has been no doorkeeper to challenge the entrance of any one not coming in an official character, as also the evidence, which is by no means strong, that occasionally some such persons may have entered and attended the meetings. The only arguable ground of this claim is that they are public meetings. The first observation on this is that we are dealing with the creature of statute, and that there is no room for the application of the common law on which one would fall back if dealing with, for instance, vestries: see Steer's Parish Law, 5th ed., p. 195. The borough council is constituted under the Municipal Corporations Act, 1882, and if the defendant's claim is well founded there must be expressed in, or reasonably inferred from, that Act a right on his part as one of the public to attend the meetings. Admittedly there is no expression of any such right. Can it be reasonably inferred? The defendant endeavours to answer this affirmatively. Of those provisions of the statute, including the rules set out in the Second Schedule, which ensure some publicity of the proceedings of the council, none of them really affects the public except the 5th rule, which provides for notice of the time and place of intended meetings being fixed on the town hall, and if the meeting is called by members of the council the notice must also state the business proposed to be transacted. Giving the utmost possible weight to these provisions, I cannot deduce therefrom any intention on the part of the Legislature that the public shall have a right to be admitted to the meetings; and indeed I should infer that this is the limit of publicity which it was thought desirable to ensure, and that no more was contemplated."

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This judgment is affirmed by the Court of Appeal, Buckley, L.J., saying, at p. 469: "But all this must be controlled no doubt by anything which is found in the statute which governs the corporation. If there is anything in the statute, that must prevail. The Master of the Rolls has dealt with the provisions of this statute and of the Local Government Act of 1894, to which reference may be made as to other like authorities. I fail to find in the Act which creates this corporation anything which says that a burgess is entitled to access to the meetings of the deliberative body. In sec. 233 I do find that he is entitled to copies of the minutes of the proceedings of the council. He is entitled to know what they have done. But the Act contains no provisions as to his being entitled to be present at the proceedings themselves."

Then, the other case that has been much laboured this morning, *Williams v. Mayor, etc., of Manchester*, 13 Times L.R. 299, is a mere interpretation of sec. 233 of the Municipal Corporations Act of 1882, as to the extent of the right given by that section to a burgess to inspect the minutes of council and its committees, as indeed, the report starts out by saying, and it does not support the proposition that the public have rights in the premises not given by the statute. This was practically a consent judgment case. Epitomes only of the minutes of committees were prepared for the council, but not incorporated in the minutes of council. Mr. Asquith, for the corporation, said: "Perhaps if the epitomes were treated as minutes of the council that would satisfy both parties." Judgment is given as follows: "The Court then granted a declaration that the burgesses were entitled to inspect in future all acts of committees submitted to the council for approval and either approved or not." Therefore that case does not support the proposition that the public have rights not given by the statute.

Therefore, both on principle and authority, we think the appeal should be dismissed with costs.

[APPELLATE DIVISION.]

McMULLEN v. WETLAUFER.

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Feb. 19.

Malicious Prosecution—Reasonable and Probable Cause—Advice of Counsel—Approval of Crown Attorney—Belief of Complainant in Guilt of Accused—Forgery—Similarity of Handwriting—Expert Opinion.

The judgment of MIDDLETON, J., 32 O.L.R. 178, was affirmed.

Per FALCONBRIDGE, C.J.K.B., and RIDDELL, J.:—Although the facts are placed fully and fairly before experienced counsel, or even the Crown Attorney, and a prosecution is advised, this does not constitute reasonable and probable cause for a prosecution if the complainant does not himself believe in the guilt of the accused. The advice of counsel, after disclosure of all facts, is cogent evidence of the existence of reasonable and probable cause; but, if the complainant does not believe in the guilt of the accused, there is no reasonable and probable cause for him.

Connors v. Reid (1911), 25 O.L.R. 44, followed.

While mere similarity of handwriting may in many cases be no reasonable cause for charging a person with forgery, the opinion of experts, that the handwriting in a proved document is not only similar to but identical with that in a controverted document, is or may be of great value, and furnish most reasonable and probable cause.

Clements v. Ohrly (1847), 2 C. & K. 686, considered.

In this case there were reasonable and probable grounds for the honest belief of the defendant in the guilt of the plaintiff; and for that reason the judgment below should be affirmed.

APPEAL by the plaintiff from the judgment of MIDDLETON, J., 32 O.L.R. 178.

February 9 and 10. The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

H. H. Dewart, K.C., and *R. T. Harding*, for the appellant. Under the rule of evidence introduced by the Judicature Act, 1913, sec. 62, and now found in the Judicature Act, R.S.O. 1914, ch. 56, sec. 62, the trial Judge has to decide the question of reasonable and probable cause. The learned trial Judge seemed to have thought that the new rule was formulated to do away with the decision in *Connors v. Reid* (1911), 25 O.L.R. 44. *Longdon v. Bilsky* (1910), 22 O.L.R. 4, is considered and perhaps overruled in *Connors v. Reid*, 25 O.L.R. at p. 48. *Malcolm v. Perth Mutual Fire Insurance Co.* (1898), 29 O.R. 406, lays down the law for this case. There were no reasonable grounds for the defendant's belief in the plaintiff's guilt; the question is the defendant's condition of mind at the time. The defendant should have made further inquiry.

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T. N. Phelan, for the defendant, respondent, referred to the cases cited in the judgment below. Upon the question of handwriting he referred to R.S.O. 1914, ch. 76, sec. 52. Upon the question of reasonable and probable cause, he referred to Halsbury's Laws of England, vol. 19, p. 681; *Martin v. Hutchinson* (1891), 21 O.R. 388. He also cited *Regina v. Silverlock*, [1894] 2 Q.B. 766, on the question of handwriting testimony.

Dewart, in reply argued that there were facts which the defendant should have known, and which he did not try to find out; further, that even honest belief founded on insufficient grounds is not enough: *McGill v. Walton* (1888), 15 O.R. 389.

February 19. RIDDELL, J.:—This is an appeal from the judgment at the trial of Middleton, J., 32 O.L.R. 178. The facts are stated in some detail in the reasons for judgment.

Upon the hearing, counsel consented that we should ask the learned trial Judge for his finding in respect of the belief of the defendant at the time of laying the information, etc.; and we have done so. Mr. Justice Middleton informs us that he considered that the defendant believed in the guilt of the plaintiff, but not on sufficient grounds.

In my view we are not called upon to pass upon the question, "If the facts are placed fully and fairly before experienced counsel or even the County Crown Attorney, and a prosecution is advised, does this constitute reasonable and probable cause?" As at present advised, I am not able to assent to an answer in the affirmative to that question, at least if the complainant does not himself believe in the guilt of the accused. The advice of counsel, after disclosure of all facts, is cogent evidence of the existence of reasonable and probable cause; but, if the complainant does not believe in the guilt of the accused, there is no reasonable and probable cause for him: *Connors v. Reid*, 25 O.L.R. 44. This is implied in the terminology to be found everywhere in cases and text-books: that the prosecution must be *bonâ fide*. A prosecution must necessarily be *malâ fide* which is conducted by a prosecutor who does not believe in the truth of the charge he makes.

Here, however, the defendant believed that the plaintiff was

guilty; and, if he had reasonable grounds for such belief, he is excused.

The facts are not very numerous or complicated; I propose to exclude everything but what bears on the present question. The defendant came into possession of certain letters. His solicitor recommended that the letters should be submitted to a well-known expert on handwriting for report as to whether they were the production of either of two women suspected. The report was in the negative, and the matter dropped. Afterwards a subpoena, with admitted handwriting of the plaintiff, came into the solicitor's possession; and the expert was confident that the letters were written by the same hand. The plaintiff denied this on oath, and another expert was consulted, who agreed with the first. Thereupon the solicitor advised that the matter should be laid before the Crown Attorney. This was done. The first expert attended before Mr. Corley, and that very efficient Crown officer was convinced by the expert's reasoning that the handwritings were identical.

We are pressed with the language of Lord Denman, C.J., in *Clements v. Ohrlly* (1847), 2 C. & K. 686, at p. 689: "In my opinion, similarity of writing is not enough to constitute probable cause for charging a person with forgery without evidence of other circumstances, and parties cannot create probable cause by referring to others, whether they be the most practised attorneys or the most experienced counsel." The defendant in that case had "deposed that he believed that the direction in the corner of the bill was in the plaintiff's handwriting" (p. 687); and, so far as appears, there was nothing else to connect the plaintiff in any way.

It is to be observed, first, that the Chief Justice was not laying down any opinion as to the law (proper). "What is reasonable and probable cause in an action of malicious prosecution . . . is to be determined by the Judge. In what other sense it is properly called a question of law I am at a loss to understand:" Lord Chelmsford in *Lister v. Perryman* (1870), L.R. 4 H.L. 521, at p. 535. "The existence of 'reasonable and probable cause' is an inference of fact:" Lord Westbury in the same case, at p. 538. We are, therefore, not at all bound by Lord Denman's opinion.

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Again, it must be remembered that Lord Denman was one of the school of Judges who withstood the admission of evidence of this character. A very careful and comprehensive history of the course of decision will be found in Dr. Wigmore's exceedingly valuable work on Evidence, paras. 1991 *sqq.*

In *Doe dem. Mudd v. Suckermore* (1836), 5 A. & E. 703, 749, however, some remarks of Lord Denman's are to be found as follows: "If the proved document and the controverted are both in Court, and the witness speaks to their resemblance or difference from immediate observation, he seems to perform a task for the jury which every one of them, even though illiterate, might as well perform for himself. But, if he is a person of some skill (however low in degree, and however generally shared with him), he does what possibly the jury may be incompetent to do."

Moreover, the learned Chief Justice speaks only of "similarity of handwriting." Fifty years ago, thousands of pupils in Upper Canada were taught the Spencerian system of penmanship; the consequence was that of the pupils of the same teacher each of the "good writers" wrote a hand closely resembling that of all the others; while each of the "bad writers" enjoyed his own idiosyncratic cacography. Hundreds wrote a similar hand, and it is plain that "similarity of handwriting" to that of one of these would not be "enough to constitute probable cause for charging a person with forgery without evidence of other circumstances." The Chief Justice says no more than this.

If the meaning of the language used in *Clements v. Ohrly* be more than what I have indicated, and Lord Denman intended to lay down a rule of law, he should not be followed. We cannot abjure our common sense at the bidding of any person, however eminent and able, judge or not, English or otherwise.

While mere similarity of handwriting may in many cases be no reasonable cause, the opinion of experts that the handwritings are not merely similar but identical is or may be of very great value, and furnish most reasonable and probable cause. Just as mere similarity of feature, etc., may not be much or any evidence of identity, such a similarity as convinces a

competent observer of the identity is most cogent. Many a man has been convicted, and rightly convicted, of forgery on just such evidence—and indeed on less evidence than is to be found in this case. Had the criminal jury found the plaintiff guilty of forgery, no appellate tribunal would have thought of setting aside the verdict.

It may not be amiss to add that more than one member of this Court would, in the absence of the jury's verdict, have no hesitation in holding that the documents were by the same hand.

In that state of facts, how can it be fairly said that there were not reasonable and probable grounds for the honest belief of the defendant? With great respect, I think that the learned trial Judge sets too high a standard for this defendant, and that it should be found that the belief of the defendant was upon reasonable and probable grounds.

I am not losing sight of the contention that the defendant should have made further inquiry. In *Lister v. Perryman*, L.R. 4 H.L. 521, there was a contention that further inquiry should have been made. No doubt, in that case it was reasonable that further inquiry should have been made, but the "very sensible view" of Mr. Baron Bramwell was adopted, *i.e.*, "it would have been a very reasonable thing . . . to have done so, but it does not therefore follow that it was not reasonable not to have done so" (p. 533.)

It is very often taken for granted, and oftener argued, that, when a certain course of conduct is admitted or proved to be reasonable, the opposite must be unreasonable. Of course that is not so; the real test is rather negative than positive; and, if one avoids all that to be reasonable a man should avoid, he cannot be charged with unreasonable conduct.

One generally goes to his office by a certain route—a wholly reasonable route—but on a particular day for no assignable reason, for some mere whim or caprice or from some petty accident, he goes by another route. He cannot, therefore, be said to act unreasonably, and, if an accident happen, he could not be met, for that reason only, with the defence of contributory negligence.

Sufficient evidence to satisfy a reasonable man being avail-

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able and at hand, there is, speaking generally, no need to make further inquiry. Of course if there is a belief or perhaps even suspicion that inquiry will displace the evidence already found, it would or might be different. That would in itself go to *bona fides*. Nothing of the kind is to be found in the present case.

Here then, in my view, we have the four essentials in such a defence as laid down by Hawkins, J., in *Hicks v. Faulkner* (1882), 46 L.T.R. 127, at p. 129: (1) an honest belief in the guilt of the accused; (2) this belief being based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; (3) this belief based on reasonable grounds, *i.e.*, such as would lead any fairly cautious man in the defendant's situation so to believe; and (4) the circumstances so believed and relied on such as amount to reasonable ground for belief in the guilt of the accused.

It must not be forgotten that it is not knowledge that is required, but belief. We know when we (1) believe (2) on reasonable grounds (3) what is in fact true. The third element is or may be wanting, and yet the kind of belief required for this defence exist.

I think the appeal should be dismissed with costs.

FALCONBRIDGE, C.J.K.B., concurred.

LATCHFORD and KELLY, JJ., agreed in the result.

Appeal dismissed with costs.

[MIDDLETON, J.]

TORONTO GENERAL TRUSTS CORPORATION V. GORDON MACKAY &
Co. LIMITED.1915
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Contract—Construction—Sale of Stock and Assets of Commercial Company—Ascertainment of Amount Payable—Ambiguity—Recital—Evidence—Acts and Conduct of Parties—Contemporaneous Exposition—Election to Accept Interpretation of one Party—New Agreement—Estoppel—Rules for Interpretation of Contracts.

An agreement made between M. (since deceased) and the defendants, dated the 16th February, 1912, recited M.'s control of the stock in a certain incorporated commercial company, his desire to dispose of the company to the defendants, and that the defendants "are willing to purchase the said company on the basis of its having a paid-up capital of \$50,000, and assets, after handing over the book-debts as mentioned in paragraph 8, and after making payments of \$1,000 a month referred to in paragraph 5, of not less than the said amount of \$50,000, as ascertained on the basis provided in paragraphs 2 and 3." It was then provided that the assets to be purchased, other than the shares, were to consist of the stock in trade and fixtures only, the fixtures to be valued at \$5,000, the stock to be valued at 85 cents on the dollar, according to the stock-sheets. By clause 4, M. was to pay all the liabilities down to the 1st March, and was to be entitled to all the book-debts, of the company. By clause 5, the defendants were to pay M. for the shares an amount equal to the value of the goods and fixtures, \$20,000 by converting 200 of the shares into first preference shares bearing a dividend, \$20,000 in cash, and the balance in monthly sums of \$1,000 each, with interest. The value of the goods and fixtures was ascertained to be \$77,561.50. The question in issue was, whether, as apparently contemplated by the recital, the defendants were to have \$50,000 left in the company, to represent its capital, after making the monthly payments—whether all that was to be paid was \$27,561.50—or whether the plaintiffs, the executors of M., were to be entitled to receive in instalments the whole amount, less only \$40,000, that is, a net sum of \$37,561.50:—

Held, certain provisions of the agreement being in conflict, that evidence of what was done under the agreement was admissible to shew how the parties construed the bargain, and also to shew that in effect a new contract had been made by which the transaction was completed upon a certain footing; but that evidence of negotiations and conversations antecedent to the agreement and of rejected draft agreements was inadmissible to aid in the interpretation.

And held, looking at all that was done, that it was never intended that any greater sum than \$67,561.50 should be paid.

Discussion of the maxim *contemporanea expositio est optima et fortissima in lege* and its qualification.

In this case a new contract, based upon the interpretation of the agreement put forward by the defendants, while the agreement was yet executory, which M. elected to accept, was in fact made; or, putting it another way, when M., without protesting, permitted the transaction to be carried out on the basis of a letter written by the defendants' solicitor, the plaintiffs were estopped from now setting up any other as the true meaning of the agreement.

Semble, that an artificial rule, such as that an unambiguous contract cannot be modified by a mere recital, is to be invoked only as a last resort.

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ACTION by the executors of Joseph Mickleborough, deceased, to recover the sum of \$10,000, in the circumstances mentioned below.

February 11 and 12. The action was tried by MIDDLETON, J., without a jury, at Toronto.

C. J. Holman, K.C., and *J. D. Bissett*, for the plaintiffs.

I. F. Hellmuth, K.C., and *J. H. Fraser*, for the defendants.

February 19. MIDDLETON, J.:—This action is based upon an agreement which, notwithstanding Mr. Hellmuth's eulogy praising it as a model of draftsmanship and clarity, I find exceedingly obscure and difficult of construction.

Joseph Mickleborough, in his lifetime of the city of St. Thomas, owned or controlled all the stock of a mercantile company called "J. Mickleborough Limited." This company had apparently carried on a successful business in that city, and negotiations took place looking to the sale of the entire undertaking to the defendant company, wholesale merchants carrying on business in Toronto. These negotiations eventuated in the agreement in question, which bears date the 16th February, 1912. It was executed after much negotiation and after many drafts had been prepared and revised by the solicitors for the contracting parties.

Mr. Hellmuth tendered evidence of the negotiations antecedent to the making of this contract, to aid in its interpretation. I refused to receive this evidence. Mr. Holman, while resisting any evidence of Mr. Hellmuth, strenuously sought to give in evidence not merely rejected drafts of agreements but conversations prior to the making of the bargain, with a view of shewing me the contract ultimately made. This I also rejected. I admitted evidence as to what was done under the contract, not merely to shew how the parties construed the bargain, but with the view of allowing it to be shewn that in effect a new contract had been made by which the transaction was completed upon a certain footing.

In the first place, it is I think, my duty to ascertain from the document itself exactly what was contracted for between the

parties, if this can be extracted from what appears within the four corners of the document itself.

Turning, then, to the document, it recites Mickleborough's control of the stock in the company, his desire to dispose of the company to the defendants, and that the defendants "are willing to purchase the said company on the basis of its having a paid-up capital of \$50,000, and assets, after handing over the book-debts as mentioned in paragraph 8, and after making payments of \$1,000 a month referred to in paragraph 5, of not less than the said amount of \$50,000, as ascertained on the basis provided in paragraphs 2 and 3." It is then provided that the assets to be purchased, other than the shares, are to consist of the stock in trade and fixtures only, the fixtures to be valued at \$5,000, the stock to be valued at 85 cents on the dollar, according to the stock-sheets. By clause 4, Mickleborough is to pay all the liabilities down to the 1st March, and is to be entitled to all the book-debts, of the company. There is a provision for the adjustment of insurance, telephone charges, etc., and for the granting of a lease by Mickleborough of the store premises, which he owned.

Apart from the recital which I have quoted, the difficulty is created by the provisions for payment. By clause 5 it is provided that the defendants "will pay the said Joseph Mickleborough for the said shares an amount equal to the value of the said goods, wares, merchandise, and fixtures, ascertained as herein provided, as follows: \$20,000 by converting 200 of the said shares into first preference shares bearing a dividend . . . \$20,000 in cash, and the balance in monthly sums of \$1,000 each, with interest on the balances remaining unpaid at 6 per cent. per annum, payable half-yearly."

The stock was taken, the adjustments were made, and the value of the goods and fixtures was ascertained to be \$77,561.50. The question at issue is, whether, as apparently contemplated by the recital, the purchaser is to have \$50,000 left in the company, to represent its capital, after making the monthly payments, that is to say, whether all that is to be paid is \$27,561.50, or whether the plaintiffs were to be entitled to receive in instalments the whole amount, less only the two sums aggregating

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\$40,000 paid in cash and by the transfer of stock, that is, a net sum of \$37,561.50.

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It seems to me to be idle to contend that there is not some measure at least of conflict between these two clauses. It is quite obvious that if there was to be left \$50,000 of net assets after all the \$1,000 payments had been made, as stated by the first clause, the latter clause ought to have provided, not for payment of the entire balance, but of the entire balance less \$10,000.

The whole frame of the agreement is awkward: because, no matter what may be the value of the goods and fixtures, the same trouble is bound to arise. If the agreement meant that for the \$50,000 of stock \$40,000 only was to be paid, it ought to have been possible to say so in simpler language. The agreement is one for which the parties are equally responsible; it is the joint handiwork of their respective solicitors.

Mr. Holman urges that I ought to reject the preamble, and act solely upon the contractual clause. Mr. Hellmuth urges that what took place afterwards indicates that the parties adopted a certain construction, and that I ought to accept and act upon it.

Before entering into a discussion of the legal questions, I think it better to trace the history of the completion of the transaction. Both parties realised that care was required in seeing that difficulty would not arise in the future from the way in which the assets of the company were dealt with. It was proposed to hand over to the shareholders all the book-debts and a very large sum of money, more than half the nominal amount of the capital, and it was feared that, unless this was carefully done, liability might be imposed upon the stockholders, either vendor or purchaser, if the company should at any time become financially involved. A series of resolutions were prepared with a view of carrying out the transaction in a way that should not be open to criticism. These resolutions were prepared by Mr. McMaster and submitted by him to Mr. Glenn, who was acting for Mr. Mickleborough. It does not appear to me to be material to discuss the form which was being adopted. Mr. McMaster prepared these resolutions upon the basis of the figures given;

and, although he mentions that the transfer is on the basis of leaving a capital of \$50,000, he deducts from the gross amount \$40,000 only, leaving the balance \$37,000. He, however, proposes to deduct from this a further sum of \$10,000 as representing the excess of the liabilities over the book-debts, leaving a net balance of \$27,000.

Mr. Glenn responds to this on the 16th April, stating that, if "there is any difficulty in making the minutes agree exactly with the agreement, there ought to be an undertaking on the part of your client that the provisions of the agreement shall govern in every respect. . . . It would be better, I think, if there were a short agreement or undertaking that anything in the minutes should not prejudice Mr. Mickleborough's right to receive the principal and interest provided for in the agreement between the parties." This remark of Mr. Glenn is pressed somewhat unduly by Mr. Holman, for it is clear from its context that it is called forth only by some doubt as to whether there is a discrepancy between the minutes and the agreement as to the time from which interest is to run.

Mr. McMaster, in his reply on the 24th April, after referring to some alteration in figures not now material, adds: "I have altered the minutes so as to make it clear as to the date from which the interest is to run, and if that is not absolutely clear—and I think it is—from the minutes themselves, it is governed absolutely by the agreement which has already been signed by the parties, so that I do not think we need have any new agreement about it."

Some further correspondence took place looking to the holding of a meeting at which the draft minutes were to be adopted, which is not material.

On the 30th April, Mr. McMaster wrote a letter pointing out that in the earlier correspondence and documents he had been in error, and that under them Mr. Mickleborough would be getting more than the surplus provided for by the agreement—evidently referring to the surplus of the value of the assets over and above the \$50,000. He goes into the matter at some length and clearly; pointing out that all that Mr. Mickleborough is entitled to receive is the \$20,000 cash, \$20,000 stock, and \$27,561.50, the ex-

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cess of the assets other than the book-debts over the \$50,000 capital.

There is no ambiguity in the position then taken; and, if Mr. Mickleborough was to receive \$77,561.50, and not \$67,561.50, one would have expected some immediate protest from Mr. Glenn. Instead of that, there was nothing in writing. Mr. McMaster states that he had a conversation with Mr. Glenn, and that Mr. Glenn acknowledged the accuracy of the position taken. Unfortunately Mr. Glenn died before the recent difficulty arose between the parties. Mr. Mickleborough also died, and the question did not arise until long after his death.

There is no reason why I should hesitate to accept, as I do, Mr. McMaster's statement. I think it is amply borne out by all that followed.

The next document produced is a letter from Mr. Glenn, bearing date the 7th May, which contains no reference to Mr. McMaster's letter of the 30th April, but which does refer to the carrying out of the transaction on the basis of Mr. McMaster's amended minutes.

Other correspondence follows, and the resolutions in their amended form, as prepared by Mr. McMaster, were duly passed at a meeting of the company held at Mr. Mickleborough's residence; and the transaction was regarded as completed upon that date.

The purchasers had taken possession of the physical assets at the time contemplated, about the 1st March, and arrangements had been made by which two gentlemen were placed in charge of the business, they each taking \$4,800 stock in the company so as to give them a real interest in the business; the stock taking being largely financed by the defendants.

Books of the company kept at St. Thomas were opened, and journal entries were made, by which Mr. Mickleborough had carried to his credit the balance of \$27,561.50, and payments of \$1,000 and interest were than made to him from time to time.

Singularly enough, although the amount carried to Mr. Mickleborough's credit was \$27,561, the young man who acted as secretary-treasurer, and who held \$4,800 of stock, computed the interest as payable on the basis of a credit of \$37,561. This

arose from some understanding or misunderstanding which, he says, he entertained, that this was the true amount of the debt. The payments of principal and interest were entered from time to time in statements sent to Messrs. Gordon Mackay & Co. Limited, but there was nothing in these statements to indicate how the interest had been computed. Balance-sheets were taken off from time to time and sent forward, these in every case shewing the smaller amount of indebtedness.

Mr. Mickleborough died on the 26th November, 1912; Mr. Glenn died on the 25th August, 1914; and Mr. McIntyre, the vice-president of the company, died in October, 1914. It is not shewn that he knew anything about the facts. Some considerable time after Mr. Glenn's death, the question of the balance due arose between Gordon Mackay & Co. and the executors of Mickleborough; and this action concerns the \$10,000 alone.

If as a matter of law I am entitled to look at what was done, I have no hesitation in finding that all that took place shews that it was never intended that any greater sum than \$67,561.50 should be paid. Mr. Glenn was a most careful and capable solicitor, and one who would appreciate to the full the position clearly taken by Mr. McMaster; and, if it had not been in accordance with the real intention of the parties, no one would have pointed it out more quickly and more clearly than he.

Chief Justice Tindal, perhaps more than any one else, relied upon action under a document as the best key to its interpretation. For example: "Upon the general and leading principle in such cases, we are to look to the words of the instrument and to the acts of the parties to ascertain what their intention was; if the words of the instrument be ambiguous, we may call in aid the acts done under it as a clue to the intention of the parties:" *Doe dem. Pearson v. Ries* (1832), 8 Bing. 178, at p. 181. "There is no better way of seeing what they intended than seeing what they did, under the instrument in dispute:" *Chapman v. Bluck* (1838), 4 Bing. N.C. 187, at p. 193.

Concerning the maxim *contemporanea expositio est optima et fortissima in lege*, to which this principle is closely akin, Lord Coke says: "Now this that hath been said does agree with our books, and therefore it is *benedicta expositio* when our ancient

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authors and our yeare books, together with constant experience, doth agree" (2 Inst. 181.)

Authority is not wanting to shew that this maxim must not be unduly pressed, and it is clear that, where the contract is devoid of all ambiguity, its plain provisions must not be defeated merely because the parties have acted upon a mistaken interpretation of its provisions. The case cited by Mr. Holman, *Lewis v. Nicholson* (1852), 18 Q.B. 503, recognises the rule and this qualification. Campbell, C.J. (p. 510) says that the contract is free from ambiguity, and then, "That being so, I am clearly of opinion that we cannot look to subsequent letters to aid us in construing the contract." To quote this omitting the introductory words "That being so," is to miss the whole meaning of what was said.

See also *North Eastern R.W. Co. v. Hastings*, [1900] A.C. 260, where Lord Halsbury says (p. 263): "No amount of acting by the parties can alter or qualify words which are plain and unambiguous."

But I doubt whether contemporaneous exposition is the true principle here applicable. It seems to me rather that the law would imply the making of a new contract based upon the interpretation claimed. Assume an ambiguous document, while the contract is as yet executory: one party puts forward a certain interpretation, free from all ambiguity; the other may either contest the position taken or may elect to receive the benefit upon an acceptance of that construction. If he so elects, a new contract is in fact made.

Or it may be that the case should be regarded as an application of the doctrine of estoppel. When Mr. Glenn and his client permitted the transaction to be carried out on the basis of Mr. McMaster's letter, without a word of protest, it is not unfair to say that they are precluded from now setting up any other as being the true meaning of the agreement.

The attempt to offset what was done by Mr. McMaster and Mr. Glenn by an inference to be drawn from the computation of interest upon the larger claim, I think, entirely fails. It is not shewn that the defendants knew that the computation was made upon this basis. No doubt, they had the means of ascer-

taining if an accurate computation had been made by them; but the failure to compute or to notice the mode of computation does not amount to an acquiescence in it. It is more than offset by the balance-sheets, which are all based upon the smaller claim.

This relieves me from considering whether the rule which Mr. Holman invokes, that an unambiguous contract cannot be modified by a mere recital, applies to a document of this kind. All artificial rules are, I think, to be invoked only as a last resort. The rule invoked is much on a par with that which has defeated the intention of testators, that the last clause in a will has greater effect than an earlier clause, now commonly referred to as only "a rule of thumb."

For these reasons, the action fails, and must be dismissed with costs.

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Mortgage—Absent Mortgagee—Application by Mortgagor for Vesting Order upon Payment of Mortgage-money into Court—Trustee Act, secs. 2(q), 8, 9—"Trustee"—Sale of Land Free from Incumbrance—Order under Conveyancing and Law of Property Act, sec. 21—Interest—Costs—Foreign Curator—Notice.

A mortgagee of land in the Province of Ontario lived in the Province of Quebec; he went to Europe in June, 1914, and became interned in Germany as a prisoner of war; being an absentee, a curator of his property was appointed and the appointment homologated by the Superior Court of the Province of Quebec; but, admittedly, the curator had no authority to reconvey the mortgaged land in Ontario upon payment of the mortgage-money. The mortgagor had sold the land upon terms entitling the purchaser to call for a title free from incumbrance; but it was impossible to obtain the mortgagee's signature to a discharge of the mortgage:—

Held, that during the continuance of a mortgage there is no relationship of trustee and cestui que trust between the mortgagor and mortgagee; and, therefore, the Trustee Act, R.S.O. 1914, ch. 121, did not apply so as to enable the Court to make an order under its provisions vesting the land in the mortgagor, upon proper terms to secure the mortgage-money to the mortgagee.

Sections 2(q), 8, and 9 of the Act considered.

In re Underwood (1857), 3 K. & J. 745, distinguished.

In re Keeler's Mortgage (1863), 32 L.J. Ch. 101, not followed.

London and County Banking Co. v. Goddard, [1897] 1 Ch. 642, 650, followed.

After the exercise of the power of sale in a mortgage, the mortgagee is a trustee of the surplus in his hands, and will be allowed to pay it into Court: *In re Kingsland* (1879), 7 P.R. 460.

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In this case, an order was made under sec. 21 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, enabling the mortgagor to clear the title upon paying the mortgage-money into Court, with proper additions for interest and costs of payment out, and upon notice to the curator appointed in Quebec, if he was not a concurring party to the application of the mortgagor.

Quære, as to the curator's right to take the money out of Court.

APPLICATION by A. H. Worthington for an order under the Trustee Act, R.S.O. 1914, ch. 121, vesting in the applicant certain land in Ontario covered by a mortgage made by the applicant to J. T. Armand, upon payment into Court of the mortgage money, and for leave to pay the money into Court.

February 16. The application was heard by MIDDLETON, J., in Chambers.

D. Urquhart, for the applicant.

February 26. MIDDLETON, J.:—The mortgage bears date the 30th April, 1914. It is not produced, and I do not know whether it is yet due, according to its terms. Armand, the mortgagee, is a naturalised Canadian, holding a certificate granted the 23rd April, 1894. He left Canada for France on the 15th June, 1914, and while in Alsace was arrested as a spy and is now interned as a prisoner of war at Baden. He was heard from in January; but, owing to his situation, he cannot be communicated with, and it is impossible to obtain his signature to a discharge of the mortgage.

Armand had been resident at Montreal, and on the 10th November, 1914, a family council was held under the laws of the Province of Quebec, and Mr. Alban de Sars de Compte was appointed curator of Armand's property, Armand being an absentee. This appointment was afterwards homologated by the Superior Court of the Province.

These proceedings in the Province of Quebec, it is admitted, are not sufficient to enable the curator to reconvey the Ontario realty upon payment of the mortgage-money.

It is argued that the case falls within the provisions of the Trustee Act, R.S.O. 1914, ch. 121, and that I am therefore able to make an order vesting the land in the mortgagor, upon proper terms to secure the mortgage-money to the mortgagee.

Notwithstanding certain English cases, I am clearly of opinion that the Act does not apply. In the first place, by the interpretation clause (sec. 2(q)) it is expressly provided that a "trustee" shall not include one who is merely a mortgagee. In the second place, the scheme of the Act itself differentiates between trustees and mortgagees. By sec. 8, the Court may make a vesting order in the case of an infant mortgagee. By sec. 9, the Court may make a vesting order where the mortgagee is dead, and there is difficulty in ascertaining his heir or devisee in whom the title to the land is vested. None of these sections deal with the case of an absent mortgagee. Most of these provisions would be unnecessary if the trustee sections were intended to apply to a mortgagee.

In English conveyancing practice a deed conveying property in trust for sale and directing payment of a debt out of the proceeds of the sale is by no means uncommon, and such a trust deed is frequently described as a "mortgage." This was the form of conveyance brought before Sir W. Page Wood, V.-C., in *In re Underwood* (1857), 3 K. & J. 745. This was held not to be a mortgage within the corresponding provision of the English Trustee Act, and therefore a vesting order was made under the trustee clauses.

In *In re Keeler's Mortgage* (1863), 32 L.J. Ch. 101, a mortgage, in the ordinary form, containing a power of sale providing that the surplus proceeds after payment of the mortgagee's claim should be held in trust for the mortgagor, came before Kindersley, V.-C. He thought that, no matter what doubt he might have entertained if the matter had been *res integra*, the case was governed by the decision of Wood, V.-C.

With this I cannot agree. The whole point of the earlier decision was that the instrument was a trust deed, and not a mortgage. In the latter case the conveyance was undoubtedly a mortgage, and not a trust deed, and it did not become a trust deed within the statute and lose its character of mortgage simply because there was a power of sale and a trust of the surplus money.

Notwithstanding this, the case has found its way into textbooks, without question, as an authority for the proposition

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urged by Mr. Urquhart. In our own Courts it was at first held that a mortgagee, even as to the surplus in his hands after exercising the power of sale, was not a trustee within the statute: *Western Canada Loan and Savings Co. v. Court* (1877), 25 Gr. 151; but a more liberal construction afterwards prevailed, and in *In re Kingsland* (1879), 7 P.R. 460, Spragge, C., permitted payment into Court by a mortgagee of the surplus money in his hands. This decision has ever since been followed.

The case of *London and County Banking Co. v. Goddard*, [1897] 1 Ch. 642, 650, shews clearly the distinction, and the true principle applicable. After referring to the definition found in the Trustee Act, North, J., says: "I have always understood it to refer to the principle that during the continuance of a mortgage there is no relationship of trustee and cestui que trust between mortgagor and mortgagee. It is quite clear that if lands in mortgage are sold by the mortgagee there may be surplus proceeds, of which the mortgagee becomes trustee; or after the money has been paid off, if the land had not been reconveyed, there might be a trust of it in the mortgagee. In my opinion this definition relates exclusively to an estate conveyed by way of mortgage while that mortgage security continues to exist as such." He then adds that this restrictive definition "is not applicable to property on mortgage where the instrument of charge contains an express trust. If there is the relationship of trustee and cestui que trust established, there is no reason why the parties should not have the full benefit of the enactment."

Upon the affidavits filed it appears that the property in question has been sold upon terms entitling the purchaser to call for a title free from incumbrance. This will enable the vendor to clear the title upon complying with sec. 21* of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109. If the

*21.—(1) Where land subject to an incumbrance, whether immediately payable or not, is sold by any Court or out of Court, the Supreme Court . . . may, on the application of any party to the sale, direct or allow payment into Court . . . of an amount sufficient to meet the incumbrance and any interest due thereon; . . . there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest. . . .

(2) The Court may thereupon, either after or without notice to the incumbrancer, declare the land to be freed from the incumbrance, may make

mortgage is not yet due, allowance will have to be made for future interest. If the mortgage is past due, no such allowance is necessary; but in either case there should be an allowance made for the costs of the motion for payment out.

I gathered that the curator appointed in Quebec is a concurring party to this application. If he is, no further notice need be given. If he is not, notice should be given to him before any order issues under the Conveyancing and Law of Property Act.

I say nothing as to the curator's right to receive the money from Court. It will depend upon the domicile of the mortgagee and upon the law of the Province of Quebec. It may be that, upon its being shewn that the mortgagee was domiciled in that Province, and that, according to the law of the Province, such a curator is entitled to the money, an order may be made; but until a formal application is made it is premature to discuss this question.

any order for conveyance, or vesting order, proper for giving effect to the sale, and may give directions for the retention and investment of the money in Court.

(4) Payment of money into Court shall effectually exonerate therefrom the person making the payment.

(5) The application shall be made in Chambers, and on notice.

(8) On any application notice shall be served on such person as the Court thinks fit.

(9) The Court may make such order as it deems just respecting the costs, charges or expenses of any of the parties to the application.

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REX EX REL. MITCHELL V. MCKENZIE.

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Municipal Election—Eligibility of Candidate—Liability for Arrears of Taxes “at the Time of the Election”—Liability Existing on Nomination Day—Municipal Act, R.S.O. 1914, ch. 192, sec. 53 (1) (s)—Corrupt Practices—Threat—Evidence—Disqualification—Secs. 180, 189—Illegal Acts of Agents—Knowledge.

“Election” in the Municipal Act, R.S.O. 1914, ch. 192, sec. 53 (1), providing that a person shall not be eligible to be elected a member of a council who (s) “at the time of the election is liable for any arrears of taxes to the corporation of the municipality,” includes nomination; and the respondent, in a proceeding in the nature of a *quo warranto* under the Act to void his election as mayor of a town, being liable for arrears of taxes at the time of the nomination, though not on the day of polling, was *held* not to have been eligible as a candidate, and to have been properly unseated on this ground.

The power of disqualification exercisable by a Judge under the Act, where (sec. 189) a person, or (sec. 180) a candidate, is found guilty of a corrupt practice, is one which should be exercised only in a plain case, upon clearly proved facts.

In this case the Judge of a District Court, who heard the evidence, found that the respondent had, in a public address to the electors, used language which amounted to a threat that if the electors did not vote for him, he being the candidate of the party controlled by a power company which supplied light to the inhabitants of the town, their lights would be cut off; but a Judge of the Supreme Court, upon appeal, *held* that the words used by the respondent, in the light of all the facts set out in the evidence, were not such as could properly be determined to be a threat under sec. 189.

It was also *held*, upon the evidence, that illegal acts alleged to have been committed by agents of the respondent were not shewn to have come to his knowledge.

Judgment of the Judge of the District Court of Rainy River, so far as it unseated the respondent, affirmed; but, so far as it disqualified him, reversed.

APPEAL by David C. McKenzie, the respondent in a proceeding in the nature of a *quo warranto* under the Municipal Act, from an order of the Judge of the District Court of the District of Rainy River, voiding the election of the appellant as Mayor of the Town of Fort Frances and declaring him disqualified by reason of corrupt practices at the election.

February 23. The appeal was heard by SUTHERLAND, J., in Chambers.

W. N. Ferguson, K.C., for the appellant.

G. H. Watson, K.C., for the relator.

February 27. SUTHERLAND, J.:—At the election for the Town of Fort Frances, held on the 4th day of January, 1915, the two candidates for the office of mayor were, Louis Christie, who received 134 of the votes cast, and David C. McKenzie, 150 votes; the latter thus having a majority of 18, and on the 5th January being declared by the clerk of the municipality to have been elected. His election was attacked by one Mitchell, an elector, before the Judge of the District Court of the District of Rainy River, who, after hearing evidence, gave judgment on the 5th February, 1915, unseating and disqualifying the said McKenzie. I quote from the written reasons for judgment: "The grounds of objection upon which evidence was tendered are shortly: first, non-payment by the respondent of taxes at the time of election; second, threats or intimidation by the respondent in a speech made just prior to the polling day; third, corrupt acts on the part of agents of the respondent, as well as the voting of those not entitled to vote by reason of their not being British subjects."

From this judgment the respondent McKenzie now appeals.

As to the first ground of objection to the election of the respondent, the facts are that at the close of the hour fixed by statute for nomination, and after the clerk had read out the list of nominees for mayor, namely, McKenzie and Christie, the latter claimed the seat "because of non-payment of taxes by McKenzie." It appears from the evidence to have been the fact that McKenzie was then apparently in arrears for some \$200 for taxes for the year 1914, as to which a notice had been sent to him on the 5th October, 1914, the notice being for a larger amount of taxes in the whole, and he having in the meantime paid a portion thereof.

It also appears that, at the time of the nomination, he was on the list of those in default for taxes on the 15th December, 1914. On the day of nomination, but some time after eleven o'clock, McKenzie paid the remaining taxes. After doing so, and within the statutory time prescribed therefor, he subscribed to and filed the statutory declaration required under the Municipal Act, R.S.O. 1914, ch. 192, sec. 69, sub-sec. 4, form 2. The fifth clause of this form is to the following effect: "I am not

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liable for any arrears of taxes to the corporation of this municipality.”

Section 53 of the Act has reference to disqualification: “53. —(1) The following shall not be eligible to be elected a member of a council or be entitled to sit or vote therein: . . . (s) A person who at the time of the election is liable for any arrears of taxes to the corporation of the municipality.”

If “the election” means the day of polling, then McKenzie had paid his alleged arrears of taxes before that time and before taking the declaration, and, having subsequently been elected, could, so far as this ground is concerned, take and retain his seat. But it does not mean that. “Election” includes nomination, and consequently the respondent, being in arrears for taxes to the municipality at the time of his nomination, was disqualified as a candidate. As the District Court Judge has very truly said: “To hold that the day of polling is the day of election would enable a candidate to offer himself who was disqualified, and who, if only one, might be declared elected, contrary to the letter and spirit of the Act.” See *Regina ex rel. Adamson v. Boyd* (1868), 4 P.R. 204, at p. 209; *Rex ex rel. Zimmerman v. Steele* (1903), 5 O.L.R. 565, at p. 572; *Kennedy v. Dickson* (1915), 7 O.W.N. 769.

I am, therefore, of opinion that the respondent was properly unseated on this ground.

It appears that a company referred to in the judgment as “the power company or the paper company,” of which one Backus is the president and managing director, has already had a good deal of litigation with the municipal corporation over its taxes, and a suit or suits is or are still pending in this connection.

It also appears that the company has commenced an action against the corporation under some agreement in writing between them. It also appears from the evidence that the election was being run with two “tickets,” one which may be said to be the ticket favoured by the power company, and another opposed to it; McKenzie heading the former, and Christie the latter.

It also appears that McKenzie was associated with the power

company to this extent at all events, that he was the physician for its men, each of whom contributed \$1 a month for his services.

The evidence discloses that some of the employees of the power company and its solicitor were very active in supporting the candidature of McKenzie and those on that ticket; and, further, that several aliens were induced to vote without any right to do so at the election; and that, in the case of two or three of those who voted, taxes which they had not paid up till then were paid on the day of voting by or at the instance of the power company or its employees.

It also appears that at a public meeting held before the day of nomination, and at which others in addition to the respondent McKenzie were present and making addresses to the electors, McKenzie made use of language which the District Court Judge has found to be such that he was guilty of a corrupt practice within the meaning of sec. 189 of the Municipal Act* and subject to disqualification as therein provided for.

The finding of the Judge upon this point is as follows: "In this case I must find that the facts are that McKenzie, upon the public platform, at the meeting of the electors of Fort Frances held on the 31st December last, called for the purpose of discussing public issues, just prior to the municipal election, stated upon the public platform that he heard that Mr. Backus was going to cut off the lights of Fort Frances, and that he had gone to him and interceded and got him to agree not to cut them off before the election, as it might be considered an election dodge; and that Mr. Backus had stated to him that, if Mr. Christie was elected, the lights of the town would be turned off. And in the finding of these facts, I am taking practically verbatim the evidence of the Reverend Mr. Anderson, called by the respondent." He goes on to add: "In considering this branch of the relator's case it is necessary to consider the general conditions surround-

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*189.—(1) Every person who, directly or indirectly . . . uses or threatens to use force, violence, or restraint, or inflicts or threatens to inflict injury, damage, harm or loss, or in any manner practises intimidation upon or against a voter in order to induce him to vote, or refrain from voting . . . shall be guilty of a corrupt practice and shall be disqualified from voting for two years and shall incur a penalty of \$200, and shall also be liable to imprisonment for any term not exceeding one year.

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ing the election, which I have already set out. We have, at a large meeting of the public ratepayers called in view of the election, a statement made by a candidate that, if his opponent is elected, their lights will be cut off, and one of the ratepayers promptly characterises the statement as a threat. And the candidate as promptly replies that 'it is not a threat, it is a fact'—thus emphasising the threat rather than modifying its effect. Properly to understand the effect of this statement, we must take into account the surrounding circumstances. Here we have a candidate who is a prominent official in the employ of the power company, presumed to have confidential relations with the company, even if he had not stated that the president was his authority for the statement, telling the ratepayers, seventy-five per cent. or over of whom were dependent on this power for their light, that, if his opponent were elected, their lights would be cut off, and inferentially that, if they voted for him, they would still be able to bask in the power company's light. What was the respondent's object in making the statement unless to influence votes and what stronger reason could be given for supporting the speaker?"

The District Court Judge has set forth the facts and his conclusions and the application of the law thereto very fully, as will appear by further reference thereto. There can be little or no doubt, upon the evidence, that the question of the relations between the power company and the municipality was one of the main issues in the municipal election contest. There can be no doubt either that the question whether the ratepayers were wise in continuing to have litigation with the power company, or whether it was not better to endeavour to adjust in an amicable way their differences with it, also was a matter which was being publicly discussed.

While it is most important that nothing in the way of threat or intimidation should be used by a candidate in an election, and the electors subjected to improper influences thereby, it is also important that candidates should have a reasonable amount of freedom to discuss fully and frankly the issues in which all electors are at the time concerned. It is true that some of those present at the meeting at which the language referred to is al-

leged to have been used by the respondent, seemed to understand him to be threatening the electors with the consequences which might ensue, in case he were not, but his opponent were, elected.

While the version of what the respondent said, as found by the Judge, is supported by evidence which he had a right to believe, it is to be noticed that the respondent denies that he used language exactly similar in import to what the Judge has found. McKenzie puts it in this way: "I said that I was told that the lights would be turned off on the following Tuesday, but I interceded and asked the company not to shut off the light at least before the election, for it would be interpreted as an election dodge. But, if they persisted in electing a council that were fighting the power company on every technicality that would arise, it was not unlikely the lights would be shut off."

And again: "Q. Now wasn't this what you said? 'This is not a threat' (after the word threat was used), 'but I discussed it with Mr. Backus, and he decided not to cut off the lights on Monday night, but to wait until the following Tuesday?' A. I said 'It is not a threat, I am discussing facts.'"

"Q. You had discussed this matter with Mr. Backus? A. Yes.

"Q. Mr. Backus had threatened to cut off the lights? A. Yes.

"Q. If you weren't elected? A. No, sir. If a settlement of the bill for lights was not made, he intended to shut off the lights.

"Q. You thought it was your duty to let the audience know? A. Yes."

The power of disqualification exercisable by a Judge* is one which, as it seems to me, should only be exercised, in a plain case, upon very clearly proved facts. I confess I have had some little difficulty in arriving at the conclusion I have in this matter, and in consequence have some hesitation in coming to a different conclusion from that arrived at by the District Court.

*Section 180 of the Municipal Act: (1) A candidate elected who is found to have been guilty of bribery, or of a corrupt practice, shall forfeit his seat, and shall be ineligible as a candidate at any election for two years thereafter. (2) The Judge . . . shall report to the clerk of the municipality in which the offence was committed the name of every candidate who has been so found guilty. . . .

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Judge, who may perhaps, having seen the witnesses, be in a somewhat better position than I am to estimate fully the effect of their evidence. Nevertheless, I have come to the conclusion that the words used by the respondent, in the light of all the facts set out in the evidence, were not such as could properly be determined to be a threat under the section of the Act in question. I am not at all sure that they come under the meaning of the section at all.

The Judge has also found that the employees of the power company were by the evidence proved to have been the agents of the respondent in committing illegal acts in connection with the election. Elsewhere in his judgment he says that "it is inconceivable that the respondent was not aware of these activities on the part of the power company and its employees in his behalf, and he has not been called as a witness to give evidence as to any objection on his part as to their activities."

I have not been able, after a careful perusal of the evidence, to see that any of the alleged illegal acts were brought to the knowledge of the respondent.

On the whole, therefore, I have come to the conclusion that the appeal should be dismissed in so far as the first ground is concerned, and that in consequence the judgment unseating the respondent should stand.

I am of opinion that, in so far as the judgment disqualifies the respondent, it should be set aside.

As success has been divided, I think, in the circumstances, I will make no order as to the costs of this appeal.

[APPELLATE DIVISION.]

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BARRETT V. PHILLIPS.

March 1.

*Division Courts—Appeal—Evidence Taken at Trial—Duty of Judge—
Division Courts Act, sec. 106.*

Where an action in a Division Court comes under secs. 62(*d*) and 106 of the Division Courts Act, R.S.O. 1914, ch. 63, and the judgment therein is appealable under sec. 125(*a*), it is the duty of the Judge at the trial to "take down the evidence in writing" (sec. 106). This duty is not to be disregarded; and "notes of evidence" are not "the evidence" which the Judge is required to take down, unless these notes are so full as to shew the substance of what was said.

APPEAL by the plaintiff from the judgment of the First Division Court in the County of Hastings, pronounced by the Junior Judge of the County Court of that county, dismissing with costs an action brought to recover \$151.88 upon an acceptance.

March 1, The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

J. P. MacGregor, for the appellant.

Eric N. Armour, for the defendant, respondent.

At the conclusion of the argument the judgment of the Court was delivered by RIDDELL, J.:—This case was tried before His Honour Judge Fralick, Junior Judge of the County Court of the County of Hastings: it is one of the class of cases coming under the Division Courts Act, R.S.O. 1914, ch. 63, secs. 62(*d*) and 106, and the judgment is appealable under sec. 125(*a*).

Upon the appeal, it was stated to us that all the evidence had not been taken down by the learned County Court Judge, and that the appeal could not be decided upon what had been taken down; we found also that it was not practicable to obtain such admissions as, taken along with the notes of the trial Judge, would enable us to dispose of the case.

We, therefore, following two cases* in this Division (when differently constituted) order that there shall be a new trial;

*One of the cases is *Smith v. Boothman* (1913), 4 O.W.N. 801.

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costs, both of the former trial and of the appeal, to be costs in the cause.

It is to be hoped that the trial Judge will, on the new trial, obey the express command of the statute, R.S.O. 1914, ch. 63, sec. 106, and "take down the evidence in writing." This is the right of every litigant, and should no more be disregarded than his right to adduce evidence in support of his claim: and this duty of a Judge trying such a case in the Division Court can no more be disregarded than his duty to hear the evidence adduced. It cannot be made too plain that "notes of evidence" are not "the evidence" which the Judge is required to "take down . . . in writing," unless these notes are so full as to shew the substance of what was said. If the Judge has no stenographer, he should take down the narrative at least as fully as is the custom in an examination for discovery, etc., before a Master who takes the examination in longhand.

Order for a new trial.

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March 2.

[APPELLATE DIVISION.]

MERCHANTS BANK OF CANADA v. BURY.

Promissory Note—Addition of Words—Executory Consideration—Negotiable Instrument.

In an instrument in the form of a promissory note, made by the defendants, payable to the order of S. Bros., and by the latter endorsed to the plaintiffs, the lithographed words "value received" were struck out, and above was written "account of lumber to be shipped:"—

Held, that the instrument was a promissory note: that the words introduced were merely a statement of the transaction giving rise to the note, and did not qualify the actual promise to pay therein set forth; and that the plaintiffs, being holders in due course, were entitled to recover in an action for the amount of the note.

Judgment of MACBETH, Co.C.J., affirmed.

ACTION upon a promissory note, brought in the County Court of the County of Middlesex, and tried without a jury.

January 8. MACBETH, Co.C.J., directed judgment to be entered for the plaintiffs, giving written reasons as follows:—Shields Brothers had a sawmill near Alvinston; on the 2nd December, 1913, they owed their bankers, the plaintiffs, \$1,700 on their own

note then current, and about \$800 on overdrawn account. The bank manager asking for security for the overdraft, Shields Brothers, on the 6th December, 1913, drew a bill of exchange on the defendants in favour of the plaintiffs for \$800, payable two weeks after date, and gave it to the plaintiffs' manager at Alvinston, who forwarded it for acceptance. The plaintiffs then held a letter of hypothecation from Shields Brothers.

A few days afterwards, the defendants returned the draft, unaccepted, with the note now sued on, made by the defendants, dated the 8th December, 1913, for \$800, payable to the order of Shields Brothers, at the Royal Bank, four months after date. In the right-hand lower corner the lithographed words "Value received" had a line drawn through them, and above was written "account of lumber to be shipped." A few days afterwards Shields Brothers endorsed this note to the plaintiffs.

On the 12th January, 1914, Shields Brothers gave the plaintiffs their note for \$2,332.50—the amount then due for overdraft being added to the former note for \$1,700. This note was renewed from time to time and reduced by Shields Brothers. The last renewal, for \$1,771.35, fell due on the 29th November, 1914, and is held overdue by the plaintiffs.

The defendants had dealings with Shields Brothers. On the 8th January, 1913, they gave Shields Brothers an order for maple roller blocks, and subsequently other verbal orders, and Shields Brothers promised to ship to the defendants all the lumber they got out. It appeared that the defendants had made advances to Shields Brothers, to be repaid in lumber, and also accepted drafts drawn on them by Shields Brothers, for which lumber was shipped or was to be shipped.

The defendants' manager stated that the words on the note referred to the maple roller blocks, which had not then been shipped, but which he expected to be shipped by Shields Brothers in the winter of 1913-4. But Shields Brothers did not ship the lumber. On the 14th January, 1914, the plaintiffs advised the defendants that they held the note for \$800, and on the 18th February, 1914, the defendants replied that, unless Shields Brothers shipped them the lumber in accordance with their contract, the note for \$800, which they called a conditional note, would not be paid.

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These are all the material facts; and the question I have to determine is, whether the note now sued on is a negotiable promissory note, or, as described in the defence, an instrument expressed to be payable on the contingency of certain lumber being shipped as therein stipulated. A mere statement of a transaction does not invalidate a bill, but what if the transaction so stated shews that the bill is given for an executory consideration?

This question is propounded and discussed by Mr. Justice Russell in his Commentary on the Bills of Exchange Act, p. 65 *et seq.* I would accept his conclusion as stated at p. 67: "On the whole, it is difficult to see any good reason why the expression in the bill of an executory consideration should be held to invalidate it, unless, at all events, it could be read as the expression of a condition precedent to the obligation to pay the amount of the note." And the learned author had pointed out, in the passage immediately preceding this extract, that the fact of a note being payable to order would very fairly rebut the presumption that it was intended to be conditional upon the performance of the consideration.

I do not find anything inconsistent with Mr. Justice Russell's opinion in the following cases, on which the defendants' counsel rested his argument:—

In *Jarvis v. Wilkins* (1841), 7 M. & W. 410 (assumpsit on a guarantee), the plaintiff proved the following document: "I undertake to pay J. (the plaintiff) £6. 4s., for a suit of, ordered by P." Signed by the defendant. It appeared that the goods in question were a suit of clothes, which had been furnished to P. subsequently to the giving of the above undertaking. The plaintiff had a verdict. Pursuant to leave reserved, a rule was obtained to enter a nonsuit on the ground that the instrument was not a guarantee, but a promissory note, which required a stamp. Lord Abinger said: "This is a memorandum, that if the plaintiff will sell P. clothes, he, the defendant, will pay for them. . . . It is only a conditional promise." Parke, B.: "The introduction of the word 'ordered' . . . shews . . . a promise to pay for goods if supplied, but which were not then delivered. We are therefore enabled to collect from the instrument itself, that the consideration for the promise was not an executed consideration, but the future delivery of goods already ordered." It was

not a note, but a guarantee. In other words, on the face of the instrument itself the defendant's promise appeared to be conditional on the performance of the consideration.

Drury v. Macaulay (1846), 16 M. & W. 146, is supposed to be the leading case on the subject, but it only decides that the instrument on which the action was brought did not need to be stamped as a note. Parke, B., said: "No money is secured by it which is payable at all events, and consequently it is not a promissory note." Alderson, B.: "This document is not a promissory note. It is not certain that any money will be paid" (*quære*, payable) "by virtue of it."

But in *Shenton v. James* (1843), 5 Q.B. 199, the defendant, sued on his promise to pay £50, which was pleaded as a promissory note, tried to defeat the plaintiff's recovery by contending that the instrument on which the action was brought was not a note. Lord Denman said: "We think it clear that this was a promissory note on an executed and completed consideration. . . . All here is past; something has been done for which the damages are ascertained; and the note is given in consideration of forgoing an action. Littledale, J., said of the note in *Clarke v. Percival* (1831), 2 B. & Ad. 660, 'On the face of it, it is clear that it is not payable at all events.' Here the note clearly is so."

It may be noticed that in each of these three cases, cited by Mr. Elliott, the litigation was between the parties named in the instrument, which on its face was not expressed to be negotiable; and in each case the real question for decision was, whether the defendant's engagement to pay was absolute or conditional.

"I promise to pay to Mr. J. C. S. or his order, at three months after date, the sum of £100, as per memorandum of agreement," was held in *Jury v. Barker* (1858), E.B. & E. 459, to be a promissory note; on the face of the instrument the promise was absolute; and, if the agreement made the promise conditional, the defendant ought to have shewn it by setting it out in his plea.

Siegel v. Chicago Trust and Savings Bank (1890), 23 N.E. Repr. 417: "The mere fact that the consideration for which a note is given is recited in it, although it may appear thereby that it was given for or in consideration of an executory contract or promise on the part of the payee, will not destroy its negotiability, unless it appears through the recital that it qualifies the

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promise to pay, and renders it conditional or uncertain, either as to the time of payment or the sum to be paid."

This passage is cited with approval in *First National Bank of Hutchinson v. Lightner* (1906), 88 Pac. Repr. 59, by the Supreme Court of Kansas. I observe that the negotiable instrument law of that State is said to be merely declaratory of the common law, and contains, almost in the same words, the provisions to be found in our Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 17 (3).

I also find the following in the *Siegel* case: "If by the instrument the maker promises to pay a sum certain, at a day certain, to a certain person, or his order, such instrument must be regarded as negotiable, although it contains a recital of the consideration upon which it is based, and although it further appears that such consideration, if executory, may not have been performed." And the instrument there in question was held to be negotiable. Yet an instrument to the same effect, and almost in the same words, was held to be a mere executory agreement, and not a note, by a New York Court in *Chase v. Kellogg* (1891), 13 N.Y. Supp. 351.

So it may not be easy to apply rightly the proposition of law laid down in the *Siegel* case, though it seems to be correct and in entire accord with the views of Mr. Justice Russell.

I would refer also to *First National Bank v. Michael* (1887), 1 S.E. Repr. 855, and to Daniel on Negotiable Instruments, 2nd ed., para. 797.

In the present case, my conclusion is, that the instrument sued on is a promissory note; that the words "account of lumber to be shipped" are merely a statement of the transaction giving rise to the note, and do not qualify the absolute promise to pay therein set forth. And my opinion that this is the proper construction of the document is confirmed by the undoubted fact that it was made and issued by the defendants in favour of Shields Brothers in order that the latter might use it to obtain money or credit. Being holders in due course, the plaintiffs are, I think, entitled to judgment for the amount of the note.

The defendants appealed from the judgment of the County Court Judge.

March 2. The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

W. J. Elliott, for the appellants, contended that the words "account of lumber to be shipped" shewed that the instrument was not a promissory note, but a document evidencing a purely executory contract: *Shenton v. James*, 5 Q.B. 199; *Considerant v. Brisbane* (1857), 14 How. Pr. (N.Y.) 487; *Chase v. Kellogg*, 13 N.Y. Supp. 351; Falconbridge on Banking and Bills of Exchange, 2nd ed., p. 459; Chalmers on Bills of Exchange, 6th ed., p. 11.

Sir George Gibbons, K.C., and G. S. Gibbons, for the plaintiffs, the respondents, were not called upon.

THE COURT dismissed the appeal with costs, seeing no reason for disagreeing with the opinion of the learned County Court Judge.

Falconbridge on Banking and Bills of Exchange, 2nd ed., pp. 485, 783, was referred to.

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COOK v. DEEKS.

Company—Contracting Company—Contract Taken by Majority of Directors as Individuals—Disclosure—Ratification by Shareholders—Duties and Liabilities of Directors—Trust—Rights of Minority of Shareholders in Absence of Fraud—Ontario Companies Act, R.S.O. 1914, ch. 178, secs. 23, 93—7 Edw. VII. ch. 34, secs. 80, 81, 87, 89—Interpretation Act, R.S.O. 1914, ch. 1, sec. 27—Closing of Business of Company—Use of Organisation of Company in Carrying out Contract—Right of Action.

The plaintiff owned one-fourth of the shares of the capital stock of the defendant company, organised and incorporated for the purpose of doing the business of a contractor for railway construction work, and the three individual defendants each one-fourth, and the four were the directors of the company. The plaintiff complained that the individual defendants, concealing from him their intention, appropriated a certain contract to themselves, absorbed the organisation of the company, and used it in carrying out that contract. The contract was within the scope and practice of the business of the company; after it had been secured, it was disclosed to the plaintiff, and resolutions of the directors declining the contract and disclaiming any interest in it were confirmed by the shareholders at a meeting duly called—the three defendants being of course in control. It was also resolved that the assets should be sold and that the company should abstain from further business. The

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plaintiff, contending that these defendants were trustees of the contract for the company, sought an account of the profits:—
Held, that effect could not be given to the plaintiff's contention: to do so would be so to extend the fiduciary duty of a director that minority control would be the rule, instead of an exception caused by the fraud or unfair dealing of the majority; and would place directors who disclose their interest and have their action ratified by the shareholders in the same or a worse position than those who conceal their interest and become liable under the statute.

The Ontario Companies Act, R.S.O. 1914, ch. 178, secs. 23, 93, 7 Edw. VII. ch. 34, secs. 80, 81, 87, 89, and the Interpretation Act, R.S.O. 1914, ch. 1, sec. 27, considered.

The theory that opportunity is the same thing as interest and that conditions which might ripen into an interest are equivalent to the accomplished fact, is not one to be adopted by the Court.

Review of the authorities.

North-West Transportation Co. v. Beatty (1887), 12 App. Cas. 589, specially referred to.

Held, also, that the virtual winding-up of the company or the determination to cease business did not give the minority shareholder a right of action in the name of the company against the directors; nor did the absorption by the three defendants of the *personnel* of the organisation of the company in the course of carrying out the contract—it not being contended that these defendants induced the employees to break their engagements with the company.

Judgment of MIDDLETON, J., affirmed.

THIS action was brought by A. B. Cook, one of the shareholders of the Toronto Construction Company Limited, on behalf of himself and all other shareholders other than the individual defendants, against George S. Deeks, Thomas Hinds, George M. Deeks, the Dominion Construction Company Limited, and the Toronto Construction Company Limited, for a declaration that the individual defendants and the Dominion Construction Company Limited were trustees for the Toronto Construction Company Limited of a certain contract entered into between the Dominion Construction Company and the Canadian Pacific Railway Company for the construction of a certain line called in the evidence the Shore Line—more accurately known as the Campbellford Lake Ontario and Western Railway—and for ancillary relief.

April 27, 28, 29, and May 4, 5, 6, and 7, 1914. The action was tried by MIDDLETON, J., without a jury, at Toronto.

Wallace Nesbitt, K.C., and *A. M. Stewart*, for the plaintiff.

E. F. B. Johnston, K.C., and *R. McKay*, K.C., for the defendants.

June 16, 1914. MIDDLETON, J.:—In the year 1905, negotiations took place between the plaintiff and the defendants George

S. Deeks, George M. Deeks, and Hinds, and Messrs. Winters, Parsons, & Boomer, looking to the undertaking of construction work in Canada, both east and west, and the United States, and more particularly to the undertaking of a contract for the construction of some work upon the Canadian Pacific Railway, Sudbury Line. As the result, the Toronto Construction Company was incorporated, and the contract obtained. The firm of Winters, Parsons, & Boomer shortly afterwards withdrew, transferring their interest to the other co-adventurers in equal shares. Messrs. Cook, Hinds, and the Deeks each became entitled to one-quarter of the capital stock of the company; one share being held in the name of the wife of one of the parties for the purpose of preserving the due incorporation of the company. From that time on, the company entered into several important railway construction contracts, and has carried them through to completion, earning very large profits.

It was not contemplated that all the work to be undertaken by these gentlemen should be carried on in the name of the company. Mr. Cook undertook and carried on, for the benefit of the four, a contract known as the Livingston contract. This was taken in the name of Cook, Deeks, Hinds, and Company; but practically the whole work was carried on by Mr. Cook. Other work was taken and carried on by Mr. G. M. Deeks in the firm name of Deeks & Deeks; but all four were equally interested in this.

In the carrying out of these various contracts, as well as in seeking for other work to be undertaken, there was not always harmony between the four contracting parties. Messrs. G. S. Deeks and Hinds had the great burden of the company business, both in Ontario and the Maritime Provinces, thrown upon their shoulders. Mr. G. M. Deeks devoted himself mainly to business in the Western States; and, while Mr. Cook carried out the Livingston work, which took most of his time for two years, the feeling developed that Mr. Cook was not taking his fair share of the burdens and responsibilities of the company; and he on his part probably entertained the view that Mr. G. M. Deeks was receiving more than he earned.

As far as Mr. G. M. Deeks is concerned, the feeling culminated in a letter of the 20th July, 1909, which he wrote to Mr. Cook,

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notifying him that the contract work which the partnership firm of Deeks & Deeks had had was completed, and that he did not intend to continue the partnership longer. All work that he should thereafter do, he said, whether carried on in his own name or in the name of Deeks & Deeks, would be treated by him as new business, not including Mr. Cook.

In the view that I take of the case I am not at all concerned with the merits of these internal controversies. Mr. Cook declined to undertake work which Messrs. Deeks and Hinds thought he ought to undertake. At different times he made some endeavour to obtain more congenial work in the North-West. No new contracts for the company or its associates resulted. All this appears to me, also, to be beside the mark.

Finally, Cook secured a contract called the Teeton contract, in Montana. Cook was undoubtedly willing to allow Mr. G. S. Deeks and Hinds to share in this, but they declined to join him. Mr. G. M. Deeks had no opportunity of sharing.

At the annual meeting of the company in January, 1910, feeling appears to have run pretty high, Messrs. G. S. Deeks and Hinds thinking that the situation was very unfair, when Mr. Cook was doing nothing for the common benefit, and was carrying on independent work on his own account. Mr. Cook suggested that this could be adjusted by payment of a salary to those actively engaged in the company's management. This appears to have been scoffed at by both Mr. Hinds and Mr. G. S. Deeks, who thought it was quite derogatory to place them in the position in truth of working for Mr. Cook at a salary. Their feeling in this respect may perhaps be gathered from the fact that, while the capital of the company was only \$200,000, the dividends declared in the six years of its operation amounted to \$1,562,500, and there is still in the treasury a sum approximately equal to the capital. Nevertheless, at that meeting, it was decided that the officers actually engaged in the management of the company should receive a salary to be agreed upon thereafter, the salary to date from the 1st May, 1909. No agreement has ever been made as contemplated by that resolution.

At this same meeting Mr. G. M. Deeks was elected president, Mr. Cook general manager, and Mr. Hinds secretary-treasurer. This minute, it may be observed, was of a directors' meeting;

and salary could not be given to directors without the assent of the shareholders; and, so far as the evidence discloses, the resolution was never confirmed by the shareholders. It is also important to notice that Mr. A. B. Cook was then re-elected to the office of general manager, although not actively concerned in the conduct of the company's affairs in any way, and Mr. G. S. Deeks, who with Mr. Hinds bore the burden of the actual management, had no office save that of director.

Matters went on in much the same way, the feeling against Mr. Cook growing all the time stronger. A letter of the 14th September, 1909, written shortly before this meeting, indicates the way Messrs. Deeks and Hinds regarded Mr. Cook; and the idea not unnaturally developed in the minds of the other three, particularly in the minds of Messrs. G. S. Deeks and Hinds—who took far more part than Mr. G. M. Deeks—that as soon as possible they must cut free from Mr. Cook and leave him to his own resources. The result was that no new contracts were entered into on behalf of the company, the whole energies of the concern being bent to the closing of the work then in hand.

Had this determination then been openly announced to Mr. Cook, no exception to the conduct of his colleagues could have been taken in law or in morals. He was reaping where he had not sown, and his conduct throughout was such as to justify, if any justification were needed, the determination of the detendants to part company with him. Nothing, however, was said to him, and matters were allowed to drift along quietly. As Mr. Hinds put it in evidence: "The fact that a change was impending must have been evident to every one, and nothing but Cook's colossal egoism prevented him from apprehending it."

I do not go as far as Mr. Hinds in assigning the cause, but Mr. Cook apparently did not realise the situation.

Another cause of trouble arose in connection with the Livingston contract. The earnings in respect of this contract, in which all were interested, were considerable, but they were all retained by Mr. Cook; so, in August, 1909, when Cook was suggesting to Deeks and Hinds joining in the Teeton work, Deeks replied by wire, curtly, "Will participate in no more western work;" and Hinds wired, "Prefer to have books here fixed up before assuming any new work." This referred to the books in connec-

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tion with the western work, which had been taken to Ontario by Cook's bookkeeper.

This firm stand brought Cook to Toronto, and an adjustment was then made by which Cook submitted to have charged against his dividend in the Toronto Construction Company, the sum of about \$100,000, which represented his liability to his co-partners for moneys drawn by him on the Livingston contract, according to a statement he then presented.

When the work in hand was drawing to a close in 1911, Mr. G. S. Deeks, whom for convenience I shall hereafter refer to as "Mr. Deeks," and Mr. Hinds, looked about for further work. As already stated, they had made up their minds to exclude Mr. Cook from participation in this, but they had not communicated this fact to him. Mr. G. M. Deeks took no active part in the matter, merely falling in with the views of his cousin and Mr. Hinds. The work done in Ontario had been exceedingly satisfactory to the Canadian Pacific Railway Company. That company apparently entertained a high opinion of the executive ability of Messrs. Deeks and Hinds. Their financial standing admitted of no question. For some time negotiations had been going on in a general way looking to the arrangement of a new contract for the Shore Line. This, it was thought, might be arranged without competition or calling for tenders. Mr. Deeks and Mr. Hinds told the Canadian Pacific Railway officials that in any work thereafter to be taken Cook would have no part.

The result of all these preliminary negotiations was that in the middle of March, 1912, an agreement was arrived at between Mr. Deeks and Mr. Hinds on the one part and the railway company on the other part. While these negotiations were on foot and in a critical position, Mr. Cook and Mr. Hinds met in New York. The accounts given by the parties differ. At any rate, nothing was done by Mr. Hinds in any way to indicate his intention of excluding Mr. Cook, and it is hard to resist the inference that Mr. Hinds was careful to avoid anything which would waken Mr. Cook from his fancied security. Cook waited in New York to be advised of the result of the negotiations in regard to the contract.

Immediately after the contract had been secured by Messrs. Deeks and Hinds in their own names, Mr. G. S. Deeks sent the

wire of the 13th March to Mr. Cook, asking him to come to Toronto to meet him in relation to the affairs of the Toronto Construction Company. On the following day, Mr. Hinds sent a similar invitation. Accordingly, Mr. Cook came to Toronto for the purpose of meeting them. Mr. Hinds called upon him at his hotel and advised him that the contract was being taken by Messrs. Deeks and Hinds, and that he was to be excluded. In Mr. Cook's letter of the 16th March, he expresses his astonishment at the situation; and it is characteristic that even in that letter he claims credit to himself for the prosperity of the company owing to his action as general manager. In reply to this, Mr. Deeks points out that there is no attempt to exclude him from the company, but that the intention of Mr. Hinds and himself is to carry on business separate and apart from the company. Some negotiations took place looking to an amicable adjustment of the matter, with no result.

Thereafter the Dominion Construction Company was incorporated, it consisting of the Messrs. Deeks and Hinds and their associates. The formal contract was entered into between the Dominion Construction Company and the Canadian Pacific Railway Company, and the business was actively undertaken by that company.

Contemporaneously, a meeting of the Toronto company was called for the purpose of arranging for the voluntary winding-up of its affairs, but nothing was done, owing to Mr. Cook's protest and threatened litigation.

As the affairs of the company were wound up, its employees were in many instances re-engaged by the Dominion Construction Company. Some of them found employment with Mr. Cook, who had secured another contract, which he was carrying out as an undertaking of his own. The plant of the Toronto Construction Company was sold to the new company at a valuation, which was not shewn to be unfair, and was probably advantageous.

At the trial and on the argument much was made of the theory that this was a dishonest scheme formed by Messrs. Deeks and Hinds for the purpose of appropriating to themselves the outfit, organisation, and goodwill of the Toronto Construction Company. I am satisfied that this is not made out. The sole and

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only object on the part of the defendants was to get rid of a business associate whom they deemed, and I think rightly deemed, unsatisfactory from a business standpoint.

These three men could not, against their will, be compelled to carry on business for the benefit of an uncongenial associate. The only question is, whether they are able to free themselves from obligation to him by the course which they have taken. They represent seventy-five per cent. of the share value of the company. They are three directors out of the four. The substantial question is, can they in this summary way take in their own names and for their own benefit a profitable contract which they might, had they seen fit, have taken for the company? It is conceded that the position is not changed by the formation of the new company and the transfer of the contract to it.

Before considering the legal aspects of the question, the formal proceedings of the Toronto Construction Company ought to be mentioned. At a meeting of the directors on the 20th March, 1912, the question of the undesirability of taking any further contracts was discussed, and a general meeting of the shareholders was directed to be called. A meeting was called, and held on the 5th April, and adjourned till the 9th, when, after discussion, the meeting adjourned without taking any action. The office of general manager was abolished, and the sale already referred to of the plant was authorised.

This action was not begun until the 12th March, 1913, almost a year later. The next minutes produced are those of the meeting of the directors held on the 3rd April, 1913. The sale already made of the company's assets was confirmed; the action of the company in not entering into new contracts was confirmed; and the directors declared that the company was not in any way interested in the contract in question. This action is then dealt with, a defence is directed to be made to the action, and the proposed statement of defence is approved of. A dividend is then declared out of the money on hand, \$400,000 being divided.

The annual meeting of the shareholders was held on the 26th April. The sale of the assets was confirmed by the shareholders, the action of the company in not entering into any new contract, including that in question, was confirmed, and it was declared that the company did not desire any interest in the

contract in question; the defence filed in the action on the company's behalf being formally approved. The four parties were again elected directors. At none of these meetings, it may be said, was Cook present, although he was duly notified.

There was at the hearing a good deal of discussion as to the exact position occupied by directors. Probably the most accurate statement as to the position of a director is that he is a trustee for the company of all the property of the company which may come to his hands and that he is the agent of the company for the transaction of all its business which he is called upon as director to transact. He occupies towards the company a fiduciary relationship, and it matters little whether he is called an agent or a trustee. He is under certain disabilities arising from the position he occupies. He cannot make personal profit out of transactions with the company. In all his transactions with the company he is called upon to act with absolute good faith; but there are many things which his position does not preclude him from doing.

The fundamental principle underlying all company law, that the majority must govern so long as there is no fraud upon the minority, must be accorded its due recognition; and, when the majority determines that a company shall not go further and shall undertake no new business, this, I think, must bind the minority; and the directors, representing the majority, cannot, by reason of any supposed fiduciary obligation, be compelled to undertake business in behalf of all the shareholders, nor can they be prevented, if they see fit, from themselves undertaking profitable business which might well be undertaken by the company as a whole.

I accept to the full Mr. Nesbitt's statement that the directors in the discharge of the company's business must be absolutely loyal to the company; but, when the business is not the business of the company, and when the company as a whole refuses the business, there cannot be any fiduciary obligation which prevents the directors from acting as individuals in their own individual interests.

It must also be borne in mind that the right of action which may be asserted by an individual shareholder in a class action is a right of action vested in the company. A minority share-

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holder may in this way redress a wrong done to the company, or recover money due to the company, where the majority refuses to act; but, in this case, I think that Cook, though he may have shewn much to indicate that he was not treated with absolute fairness, has entirely failed to establish any right in the company. The company cannot, nor can the minority shareholders, compel the majority to continue to employ their capital in its ventures; nor can the company or the minority shareholders compel the majority to render those personal services without which the enterprise must be a failure.

For these reasons, I think the action fails; and, while I could wish that greater candour had been displayed towards Cook, on the whole I think his claim is absolutely devoid of merit. He has himself secured a contract from the railway company; all the profit from this will go to him, as in the case of the other contracts he was carrying on; and he has no moral claim to share in the earnings of the defendants.

In a case like this, where there is some conflict of evidence, it is probably my duty to express my opinion as to the weight to be given to the witnesses. Although there has been some failure of memory on the part of the defendants with regard to some minor details, I am satisfied that in the main their statements are entirely correct and that their evidence can be relied upon. I think their personal interest has not affected their evidence to the same extent that Cook's interest has affected his.

The plaintiff appealed from the judgment of MIDDLETON, J., dismissing the action.

January 25-29, 1915. The appeal was heard by FALCONBRIDGE, C.J.K.B., HODGINS, J.A., LATCHFORD and KELLY, JJ.

Wallace Nesbitt, K.C., and *A. M. Stewart*, for the appellant, argued that the individual respondents had made use of their position as the majority of the directors and shareholders in the Toronto Construction Company in such a way as to deprive the appellant of the benefit of the Shore Line contract, and to secure it for themselves. They referred to *Menier v. Hooper's Telegraph Works* (1874), L.R. 9 Ch. 350; *Pender v. Lushington* (1877), 6 Ch. D. 70; *Punt v. Symons & Co. Limited*, [1903] 2 Ch. 506,

515; *Martin v. Gibson* (1907), 15 O.L.R. 623, 631; *In re Brazilian Rubber Plantations and Estates Limited*, [1911] 1 Ch. 425, 437; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, 465; Lindley's Law of Companies, 6th ed., pp. 509, 510, 521; Palmer's Company Precedents, 11th ed., p. 713; *Burland v. Earle*, [1902] A.C. 83, 93; *Dominion Cotton Mills Co. Limited v. Amyot*, [1912] A.C. 546, 551; *North-West Transportation Co. v. Beatty* (1887), 12 App. Cas. 589, 599, 601; Halsbury's Laws of England, vol. 5, pp. 222, 228, 230, 289, 290.

E. F. B. Johnston, K.C., and *R. McKay*, K.C., for the respondents, the defendants, argued that the judgment of the learned trial Judge was right and should be affirmed. They referred to *Harben v. Phillips* (1883), 23 Ch. D. 14; *Normandy v. Ind Coope & Co. Limited*, [1908] 1 Ch. 84; *Percival v. Wright*, [1902] 2 Ch. 421; *Ritchie v. Vermillion Mining Co.* (1902), 4 O.L.R. 588, 594-596; *Bennett v. Havelock Electric Light Co.* (1911), 25 O.L.R. 200, 202; *MacDougall v. Gardiner* (1875), 1 Ch. D. 13; *Allen v. Hyatt* (1914), 30 Times L.R. 444; *In re Lands Allotment Co.*, [1894] 1 Ch. 616, 638; *Smith v. Anderson* (1880), 15 Ch. D. 247, 275.

Stewart, in reply.

March 2. The judgment of the Court was delivered by HODGINS, J.A.:—This action took seven days to try, and the appeal five days to argue; so that, aided by a subsequent memorandum on the facts, it may fairly be said that nothing of importance has been overlooked in the presentation of the case. I make no pretence of dealing with the evidence in detail. That was so fully done on the argument, and subsequently, that it is sufficient to say that my conclusions, so far as they are material, do not differ from those of the learned trial Judge.

Resolved into its simplest elements, the appellant's complaint against the individual respondents is, that, while concealing from him their intention, they appropriated the Shore Line contract to themselves, absorbed the organisation which belonged to the Toronto Construction Company, and used it in carrying out that contract. It is asserted that this contract, in fairness, should have come to the company, as it was within the scope, and indeed within the actual practice, of its business, was negotiated for

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by those who were charged with the carrying on of the enterprise, and has been completed with the assistance of the employees, who were got together, trained and organised, to perform the work of the company. And, in order more fully to enable this to be done, the individual respondents, it is charged, virtually stopped the operations of the company and decided to abandon further work.

The proposition of law as laid down by the appellant, in view of what happened, is that the directors who were managing the affairs of the company owed to it and to its shareholders a duty co-extensive with their opportunities, *i.e.*, measured by their activities in connection with the company's business, which duty disabled them from taking the contract for their own advantage and from refusing to seek and get it for the company's benefit.

The conclusion drawn from this proposition is, that they are trustees of the contract for the company, and must account for the profits therefrom. In fact the appellant seeks to put the individual respondents, notwithstanding their disclosure and the ratification by the shareholders of their action, in the position which a trustee of a contract held for the benefit of creditors was, in *Bennett v. Gaslight and Coke Co. of London* (1882), 48 L.T.R. 156, held to occupy, when he secretly secured the renewal for the benefit of his own firm.

Much of the evidence called by the appellant is devoted to impugning the *bona fides* of the individual respondents in the course taken by them, and that on the respondents' part in justifying themselves. But the legal proposition which I have stated, if established, renders motive unimportant, and should, therefore, be considered first. It cannot be contended that, when the individual respondents took the contract, they did not disclose it. Their reticence only lasted till it was practically secured. But, when it was entered into, the disclosure was ample and full. The resolutions of the directors, which distinctly decline this contract and disclaim any interest in it, were confirmed by the shareholders at a meeting duly called; and, if this is effective, no further question can arise.

It must be admitted at the outset that there are to be found in the books many expressions of opinion by very eminent Judges which would indicate the source of the idea that underlies the

appellant's contention, and, if read literally, give it some apparent support.

For instance, Knight Bruce, V.-C., in *Benson v. Heathorn* (1842), 1 Y. & C. Ch. 326, speaking of six directors to whom was entrusted the exclusive management of the affairs of the company, and who received £650 per annum therefor, says: "I apprehend that, without any special provision for the purpose, it was by law an implied and inherent term in the engagement, that they should not make any other profit to themselves of that trust or employment, and should not acquire to themselves, while they remained directors, an interest adverse to their duty."

Lord Romilly, in *York and North Midland R.W. Co. v. Hudson* (1853), 16 Beav. 485, 491, says: "The directors are persons selected to manage the affairs of the company, for the benefit of the shareholders; it is an office of trust, which, if they undertake, it is their duty to perform fully and entirely."

Cotton, L.J., in *In re Cawley & Co.* (1889), 42 Ch. D. 209, at p. 233, says: "In my opinion the proper rule is that a director is so far in a fiduciary position towards the company that he cannot exercise or refuse to exercise the powers vested in him as director against the interests of the company."

In *Allen v. Gold Reefs of West Africa Limited*, [1900] 1 Ch. 656, at p. 671, Lindley, M.R., speaking of powers conferred on majorities enabling them to bind minorities, says that they must be exercised, not only in the manner required by law, "but also *bonâ fide* for the benefit of the company as a whole."

The language of Sir Richard Baggallay in *North-West Transportation Co. v. Beatty*, 12 App. Cas. 589, 593, and that of Lord Cranworth in *Aberdeen R.W. Co. v. Blakie* (1854), 1 Macq. H.L. Sc. 461, 471, state the rule as it is now generally understood. In the first case it is said that "a director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect." In the second case it is stated that "a corporate body can act only by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties

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to discharge of a fiduciary nature towards their principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect."

Sir G. M. Giffard, L.J., in *Gilbert's Case* (1870), L.R. 5 Ch. 559, at p. 566, uses more homely language. He says: "If persons having to exercise a fiduciary power choose to place themselves in this position, that their interests pull one way, while their duty is plainly to do something quite different, and for that reason they abstain from exercising that power" (*i.e.*, to make a call) "they must be held to all the same consequences as though that power had been exercised."

I think that perhaps the doctrine is most concisely stated in the head-note to *Liquidators of Imperial Mercantile Credit Association v. Coleman* (1873), L.R. 6 H.L. 189, thus: "A director of a joint stock company is in a fiduciary position towards the company, and if he makes any profit on account of transactions of business when he is acting for the company, he must account for them to the company. So, if acting for himself, he proposes to the company a contract from the execution of which he will derive a profit, that profit belongs to the company."

All these expressions of opinion, however, relate to actual transactions or dealings with the property of the company, or with its corporate rights or those of the shareholders, and are not intended to lay down mere academic propositions. I have not been able to find any case where they have been applied as comprehending a duty so extensive as is here contended for, nor to a situation in any sense similar to that developed in this case. The trend of decision is rather to restrict the responsibility and increase the discretion of directors, and to free them from the serious burdens which trustees are still carrying, provided they make proper disclosure to and obtain the consent of the company. See *Lindley on Companies*, 6th ed., p. 511.

Some limitations to the responsibilities of directors may be mentioned as illustrating this tendency. While they cannot as a rule profit in the course of their agency, yet they may do so with the knowledge and consent of their principal, *i.e.*, the company:

Benson v. Heathorn (ante); *Parker v. McKenna* (1874), L.R. 10 Ch. 96, at p. 124. They are to be regarded as really commercial men managing a trading concern for the benefit of themselves and all the other shareholders, and as such are allowed a discretion: *In re Forest of Dean Coal Mining Co.* (1878), 10 Ch. D. 450, at pp. 453, 454. The strict rules of the Court of Chancery with respect to ordinary trustees might fetter their action to an extent which would be exceedingly disadvantageous to the companies they represent: *In re Faure Electric Accumulator Co.* (1888), 40 Ch. D. 141, at pp. 150, 151; they are not trustees for individual shareholders: *Percival v. Wright*, [1902] 2 Ch. 421; and they are not bound to take any definite part in the conduct of the company's business, but so far as they do undertake it they must use reasonable care in its despatch: *In re Brazilian Rubber Plantations and Estates Limited*, [1911] 1 Ch. 425, at p. 437.

But there is in our legislation (the Companies Act, R.S.O. 1914, ch. 178, sec. 93, 7 Edw. VII. ch. 34, sec. 89), as in England, a definite restriction upon the action of directors which in itself recognises the fact that they may be interested in matters in which neither the company nor other shareholders are concerned, and which goes far to define their position. That restriction is as follows: "No director shall at any directors' meeting vote in respect of any contract or arrangement made or proposed to be entered into with the company in which he is interested either as vendor, purchaser or otherwise." And the director is bound to disclose the nature of his interest "at the meeting of the directors at which such contract or arrangement is determined on, if his interest then exists," or at the next meeting after he has acquired such interest. And if he properly discloses "he shall not be accountable to the company by reason of the fiduciary relationship existing for any profit realised by such contract or arrangement." But this is not all. By statute, "the affairs of the company shall be managed by a board of . . . directors" elected by the shareholders, and, with unimportant exceptions, "no business of a company shall be transacted by its directors unless at a meeting of directors at which a quorum of the board shall be present." (1907) 7 Edw. VII. ch. 34, secs. 80, 81.

The directors are empowered to pass by-laws to regulate various things, including "the conduct in all other particulars of

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the affairs of the company," but these by-laws are subject to confirmation or rejection at the next general or annual meeting (sec. 87).

A glance at the extraordinarily comprehensive list of powers of companies under sec. 23 of R.S.O. 1914, ch. 178, will indicate how extensive those affairs may be and what a wide range of activities are open to them. It is well settled in England that the duties of a director are measured by the articles of association; and it must follow that in Ontario their duties are defined by the statute under which the company is incorporated. See *Costa Rica R.W. Co. v. Forwood*, [1900] 1 Ch. 756, [1901] 1 Ch. 746, 760; *Imperial Mercantile Credit Association v. Coleman* (1871), L.R. 6 Ch. 558, 567.

While these provisions do not, of course, exhaust the subject, they seem to indicate some important qualifications which must be taken into account in dealing with the questions raised in this case. From these statutory provisions it will be seen that a director may be concerned in a matter so that his duty and interest do or may conflict with that of the company or its shareholders. If he fully discloses that interest and does not vote, he is discharged from liability on account of his fiduciary relationship.

It is also clear that the business of a company, so far as it is done by directors as such, must be transacted at a meeting of directors, and that their regulation of the conduct of the affairs of the company, if embodied in by-laws, is subject to the will of the shareholders. In matters to which these statutory provisions do not extend, the company's business is left generally in the hands of the directors as the agents of the company. And the principle underlying the law of joint stock companies in this regard may be well expressed in the reply to the question propounded by Lord Hatherley, then Sir W. Page Wood, V.-C., when he asks, regarding the institution of litigation, "Who are the proper judges?" and answers his own question thus: "Parliament clearly intended that in general the company should be the judges of that as of every part of the company's business, supposing the company be put in the position to judge:" *In re London and Mercantile Discount Co.* (1865), L.R. 1 Eq. 277, 283.

Now, if the acceptance or rejection of a contract within the

scope and practice of the company's operations is not the business of the company and a question of policy, and comprehended in the expression "the conduct . . . of the affairs of the company," I am unable to imagine anything that may be so described.

Viewed, as I think it should be, in relation to the actual conditions under which directors assume office and to ordinary business considerations, the rule of responsibility is extensive enough. It should not be pushed to such an extent as to render it impossible for business men to assume the position of directors. Collins, L.J., in *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, at p. 465, points out how unwise it would be to lay down a standard of duty which would make it a practical impossibility to manage a commercial undertaking upon ordinary business lines; and some of the other cases I have already cited indicate an agreement with this view.

If, then, the taking or not taking of this contract was a matter within the directors' discretion, the decision in *North-West Transportation Co. v. Beatty* (*ante*) seems almost exactly to cover the point at issue. Sir Richard Baggallay, speaking of the transaction impeached in that case as one either entered into by the directors and confirmed by the shareholders or as one entirely emanating from the shareholders, says (12 App. Cas. at p. 596): "In either view of the case, the transaction was one which, if carried out in a regular way, was within the powers of the company: in the former view, any defect arising from the fiduciary relationship of the defendant James Hughes Beatty to the company would be remedied by the resolution of the shareholders, on the 16th of February, and, in the latter, the fact of the defendant being a director would not deprive him of his right to vote, as a shareholder, in support of any resolution which he might deem favourable to his own interest."

Having in mind the statement of the position of a director already quoted from that case, it is evident that the decision was given after full consideration of the principle urged as applicable to this transaction. That case was followed with approval in *Burland v. Earle*, [1902] A.C. 83, and *Dominion Cotton Mills Co. Limited v. Amyot*, [1912] A.C. 546.

These cases also afford an answer to the contention that it

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must be shewn that the confirmation by the shareholders must be by an independent majority, *i.e.*, disregarding the votes of the shareholders who are directors.

In the *Beatty* case it is said (p. 600): "It is clear upon the authorities that the contract entered into by the directors on the 10th February could not have been enforced against the company at the instance of the defendant J. H. Beatty, but it is equally clear that it was within the competency of the shareholders at the meeting of the 16th to adopt or reject it. In form and in terms they adopted it by a majority of votes, and the vote of the majority must prevail, unless the adoption was brought about by unfair or improper means." After indicating that the only unfairness or impropriety which could be suggested was the fact that the defendant Beatty possessed a voting power as a shareholder which enabled him and those who thought with him to adopt the by-law, it is pointed out that the constitution of the company enabled him to acquire this voting power, and that he was entitled to vote on every share held. It is said that "to reject the votes of the defendant upon the question of the adoption of the by-law would be to give effect to the views of the minority, and to disregard those of the majority."

This is applicable in principle to the present case, and it has, upon this point, the further authority of the two cases I have already mentioned.

Can it be said that there was any unfairness or impropriety, other than that set out in the *Beatty* case, which would leave this case outside the scope of that decision?

The general principle, set out in *Normandy v. Ind Coope & Co. Limited*, [1908] 1 Ch. 84, at p. 108, is that the Court never interferes with the majority as against the minority except in case of fraud. The sort of fraud or unfair dealing that will call for the interposition of the Court can only be ascertained from an examination of the principles on which the Courts have proceeded when dealing with this subject.

In *Martin v. Gibson*, 15 O.L.R. 623, the Chancellor set aside an allotment at par among the directors of shares worth more, as amounting to a "confiscation of the corporate rights and privileges;" and while Warrington, J., in *Ving v. Robertson & Woodcock Limited* (1912), 56 Sol. J. 412, has held that the shareholders

have no right to have the shares allotted to them, and that the company can allot to whom it pleases, it is impossible, in face of *Punt v. Symons & Co. Limited*, [1903] 2 Ch. 506, to doubt that the Canadian decision is correct. It is supported by the case of *Madden v. Dimond* (1906), 12 B.C.R. 80.

The effect of *Menier v. Hooper's Telegraph Works*, L.R. 9 Ch. 350, is to render it improper for directors so to deal with the assets or legal rights of the company as to give some of the shareholders advantages therein and to exclude the minority therefrom.

Many other cases illustrate different situations in which this rule has been applied so as to prevent directors acting improperly with regard to the company's assets or the legal rights of the company or its shareholders. But it must not be forgotten that the power to vote at a general meeting is not given to a director as such, but to him as shareholder (*In re Cauley & Co.*, 42 Ch. D. at p. 233); and that the authority of the majority, if used according to the rights conferred by the articles of association or the statute, is legally exercised: *Benson v. Heathorn* (ante); *Salmon v. Quin & Axtens Limited*, [1909] 1 Ch. 311; *Quin & Axtens Limited v. Salmon*, [1909] A.C. 442; *Automatic Self-Cleansing Filter Syndicate Co. Limited v. Cuninghame*, [1906] 2 Ch. 34; *Goodfellow v. Nelson Line (Liverpool) Limited*, [1912] 2 Ch. 324; and *Molineaux v. London Birmingham and Manchester Insurance Co.*, [1902] 2 K.B. 589, 596. And this right is not controlled by the fact that the interests of the shareholder may be adverse to that of the company or of other shareholders: *Pender v. Lushington*, 6 Ch. D. 70 (votes of nominee of shareholders to be given in the interests of a rival company); *Greenwell v. Porter*, [1902] 1 Ch. 530 (voting by agreement in a particular way). An interesting and instructive case on this point is *Marshall's Valve Gear Co. v. Manning Wardle & Co. Limited*, [1909] 1 Ch. 267.

It may be noted that by the Ontario Interpretation Act, R.S.O. 1914, ch. 1, sec. 27, it is provided that "in every Act, unless the contrary intention appears, words making any . . . number of persons a corporation or body politic and corporate shall . . . vest in a majority of the members of the corporation the power to bind the others by their acts."

The correctness of the view that the majority here should rule

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may be tested by considering what would be the result of the appellant's contention if adopted in this case. It would mean that three-fourths of the assets of the company would be employed against the wish of three-fourths of the shareholders. It would also mean that the directors would either have to devote themselves to the execution of the contract during its continuance or else resign and allow the minority to continue the business and employ the joint capital as it wished. It would further require that in order to change the policy of the company the directors must sell or transfer their shares to others, who then could vote free from the directors' disability. Indeed, it is not too much to say that it would completely deprive the company of the advantage conferred on it by the Legislature of regulating its business according to the wish of the majority, and reduce the directors to mere ciphers in the conduct of the company's business, unable to direct and yet driven by necessity to act against their interests and contrary to their own opinion.

That this has not heretofore been the view in which companies and directors have been regarded, either in England or here, is evident from the cases of *MacDougall v. Gardiner*, 1 Ch. D. 13, and *Purdum v. Ontario Loan and Debiture Co.* (1892), 22 O.R. 597, which follows it. James, L.J., in the first case, says, at p. 22: "There may be a great many wrongs committed in a company . . . there may be a variety of things which a company may well be entitled to complain of. . . . It is the company, as a company, which has to determine whether it will make anything that is wrong to the company a subject-matter of litigation, or whether it will take steps itself to prevent the wrong from being done." And Mellish, L.J., at p. 25, states the rule that has become classic: "If something has been done illegally which the majority of the company are entitled to do legally, there can be no use having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes."

These practical considerations seem to me to indicate that the appellant's position is untenable, and to require the Court to reject the theory that opportunity is the same thing as interest, and that conditions which might ripen into such an interest are equivalent to the accomplished fact.

An examination of the case, however, in the light of the authoritative statements which have determined the extent of fiduciary responsibility, leads, I think, to the same conclusion. According to these statements, there must be in the shareholders or the company an interest which ought to be protected by the directors in the performance of their fiduciary duty. And what is this interest? Has the company or have the shareholders, when they elect directors to manage its affairs, the right to say that in any and every engagement into which those directors personally enter, if it is one which may come within the corporate powers, the company has an interest irrespective altogether of whether it is in fact one that the directors have not undertaken for the benefit of the company? If so, the fiduciary duty of directors will be extended to a degree hitherto unknown. It will entirely paralyse their discretion as directors, and compel them to devote their whole time and attention not merely to what they are willing to undertake and do undertake for the company, but to that into which they may wisely or unwisely prefer not to embark the company's assets.

And it will also render them liable to the company for opportunities which a minority of shareholders contend they have neglected, and their responsibility will depend, not on their own acts, but on the outcome of engagements as to which they have virtually no power of refusal.

If the appellant is right, the interest of a company must be an interest arising by virtue of the expressed objects of the company, and not from any corporate act resulting in an actual engagement pursuant to and within those objects. And this would involve the proposition that the duty of the directors "so to act as best to promote the interests of the corporation whose affairs they are conducting" includes a duty to take for the company any contract or enter into any engagement within the scope of the corporate powers if in fact it is a transaction likely to be beneficial to the company; and who is to decide this point? It must be the directors, or the shareholders as a body, or the Court.

If either the directors or the shareholders can decide, then there is no absolute duty, but merely a duty when properly required of them by the shareholders. If the Court has to decide, how is it to do so except by resorting to the opinion of those who make up the company?

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I do not think that the solution of the question is simplified by the ease with which a remedy can be suggested, *i.e.*, by declaring the individual respondents trustees of the contract for the company. If they are trustees of the contract, the trust must have arisen when it was taken by them, and then only by reason of the antecedent conditions, so that it comes to the same thing in the end. The view that directors are trustees limits the trust to the company's money and property (*Great Eastern R.W. Co. v. Turner* (1872), L.R. 8 Ch. 149, *per* Lord Selborne, at p. 152), while the same learned Judge confines their agency to transactions which they enter into "on behalf of the company."

It was argued that the resolution to abstain from further business and to sell the assets was a virtual winding-up of the company, and that the appellant was entitled to some remedy therefor, it being a breach of trust or a fraudulent act. But counsel for the appellant could not point out to my satisfaction just what that remedy was. Obviously such action is within the corporate powers. I am unable to assent to the proposition that the winding-up of the company or the determination to cease business can give the minority shareholders a right of action against the directors in the name of the company. The cessation of its business activity without winding-up, thus preventing the shareholders from realising their share of the assets, might, of course, be more disastrous for them than closing it out. But that situation can be put an end to, if it is unfair, by asking the Court for a winding-up order. If that remedy is not sought, then, I think, the minority has only itself to blame if the state of affairs complained of is allowed to continue.

One other grievance was urged. That is the gradual absorption or use of the *personnel* of the organisation of the company by the individual respondents in the course of carrying out the contract in question. Here, again, unless the respondents induced the employees to break their engagements with the company, which was not argued, I can see no right of action by the appellant against them, apart from the main contention of the appellant.

Both these latter heads of complaint, apart from the sale of the assets, practically disappear if the main ground is made out. For *ex concessis* they were necessary consequences of the effec-

tive performance of the contract; and, if the appellant is entitled, in right of the company, to the benefit of its performance, he cannot complain of the use of the company's organisation, or to its desistment from other things.

My conclusion is that to give effect to the appellant's contention would be to extend the fiduciary duty of a director to such an extent that minority control would be the rule, instead of a rare exception only, caused by the fraud or unfair dealing of the majority; and would place directors who disclose their interest and have their action ratified by the shareholders in the same, if not in a worse, position than those who conceal their interest and become liable under the statute.

Nothing that I heard nor that I have read has convinced me that the learned trial Judge took a wrong view of the position, character, or actions of the parties to this action; and, as I think the law fully bears out his conclusions, I would affirm his judgment with costs.

Appeal dismissed.

[APPELLATE DIVISION.]

DICARLLO v. McLEAN.

Solicitor—Pauper Client—Plaintiff in Contested Action—Settlement between Parties without Knowledge of Solicitor—Collusion—Evidence—Onus—Order for Payment of Whole of Solicitor's Costs.

Where, after judgment had been recovered in this action by the plaintiff, a pauper, against the defendants for \$1,500, and, after two appeals, the action had been entered again for trial, the Supreme Court of Canada having ordered a new trial, the defendants settled with the plaintiff for \$400, which sum they paid him, whereupon he left Canada—the settlement, payment, and departure being without the knowledge of the plaintiff's solicitors, whose claim upon the plaintiff for their costs incurred in prosecuting the action and in respect of the appeals had not been paid or provided for—it was *held*, that the settlement was fraudulent and collusive; and the defendants were ordered to pay the whole of the plaintiff's solicitors' costs. In such a case the liability is not limited to the amount paid to the opposite party; and the onus is upon the solicitors to prove collusion.

Discussion of the meaning of "collusion" and review of the authorities. Order of MIDDLETON, J., affirmed.

MOTION by the plaintiff's solicitors for an order requiring the defendant to pay the said solicitors' costs of this action, including the costs of an appeal to the Appellate Division of the

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Supreme Court of Ontario and a further appeal to the Supreme Court of Canada, upon the ground that the action had been settled between the parties and the proceeds of the litigation paid by the defendant to the plaintiff behind his solicitors' backs, in fraud of the solicitors' rights and collusively.

March 2. The motion was heard by MIDDLETON. J., in Chambers.

H. H. Dewart, K.C., for the plaintiff's solicitors.

J. E. Day, for the defendant.

March 3. MIDDLETON, J.:—The cases fall into two distinct classes. If a solicitor has a lien upon the proceeds of litigation for his costs, and gives notice of that lien to the opposite party, and after such notice money is paid over to the client, the Court will in general, on motion, compel the party paying to pay the solicitor's costs. As put by Richards, J., in *Brown v. Conant* (1856), 2 P.R. 208, 211: "It is like paying a debt that has been assigned after notice. It is the notice which creates the right." In all cases falling within this class, the plaintiff's position as *dominus litis* is fully recognised, and the amount which the plaintiff has agreed to accept limits the defendant's liability.

The other class of cases is where upon the facts it is shewn that the parties have acted collusively. In this case the defendant renders himself liable to pay the full amount of the solicitor's bill, his liability being in no way limited by the amount paid to the plaintiff.

In order that the solicitor succeed in cases of this class, it is essential that he should establish collusion, in the sense in which that term is used, to the entire satisfaction of the Court. *Brunsdon v. Allard* (1859), 2 E. & E. 19, may be taken as a starting-point. There Lord Campbell, C.J., points out that the attorney's right does not prevent the parties to the action from coming to a compromise the result of which is that the attorney loses his lien, "provided that the arrangement is not a mere juggle between the parties, entered into by them in collusion to deprive the attorney of his costs." Wightman, J., states the ground for the equitable interference of the Court as being "a case of collusion thoroughly made out." Erle, J., places the matter thus: "The attorney's right, however, certainly goes to this extent, that, if a

conspiracy between the plaintiff and defendant, to defraud the attorney of his costs, is clearly made out, the Court will interfere to prevent it." Crompton, J., says that the Court "will probably restrain the parties from carrying out a collusive arrangement made on purpose to defraud the attorney of either." No collusion having been shewn, the attorney there failed.

In *Price v. Crouch* (1891), 60 L.J. N.S. Q.B. 767, the solicitor obtained relief, and the Court, while accepting the principle of *Brunsdon v. Allard*, interprets that decision by defining exactly what must be shewn to constitute collusion. Denman, J., says this (p. 769): "The point appears to me to be, what is the meaning of the word 'collusion' in relation to such a case as the present; and the meaning of the word goes no further than to denote an agreement between two parties, with the knowledge that they are doing an unfair thing in depriving a third party of a right he had." And, with reference to what is said by Lord Campbell in the earlier case, he adds: "I do not think . . . that Lord Campbell meant to say that, unless there was a 'mere juggle', a juggle in a fraudulent sense, there could be no collusion. The other Judges do not go so far. Mr. Justice Wightman hits the point: 'Was the object of the arrangement to deprive the plaintiff's attorney of his costs?' I conclude from the language both of Mr. Justice Wightman and of Mr. Justice Crompton in that case, that we are justified in holding that in the present case the object of the bargain was to defeat the applicant's lien, and so to deprive him of the costs of the work he had done as solicitor to the plaintiff. . . . This is enough to establish collusion." Wills, J., points out that the defendant knew that in making the settlement it was the plaintiff's intention to keep the money in his own pocket and defraud his solicitor. "This does not seem to be consistent with the state of mind of a person who thought everything was fair. It is obvious that if the plaintiff's solicitor's costs could be got rid of, better terms could be obtained for the defendant, and the bargain was made with that object. Both the plaintiff and the solicitors for the defendant were well aware that a considerable sum for costs was due, and their conduct shews that they desired to defeat the applicant's claim for them. The defendant's solicitors knew that they could get better terms for their client from the plaintiff if he left his solicitor out in the cold."

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The meaning of this word "collusion" is also discussed in reference to an interpleader application in the case of *Murietta v. South American, etc., Co.* (1893), 62 L.J.N.S. Q.B. 396, where Wills, J., says: "Colluding may be said to be an equivalent for playing the same game. That is the literal meaning of the word." This is assented to by Charles, J.

In *Dunthorne v. Bunbury* (1888), 24 L.R.Ir.6, Lord Ashbourne, C., in determining the defendant's liability, says (p. 9) that he went "to the plaintiff to settle the case in such a way that it would have the effect of depriving the plaintiff's solicitor of his costs. In doing so he knew he was dealing with a client who was no mark for her solicitor's costs. We were pressed . . . with the contention that it was always open to parties to meet and settle. That is true, if it be done *bonâ fide*. . . . In this case the object, or, at all events, one of the objects, of the arrangement was to deprive the plaintiff's solicitor of his costs. . . . He knew . . . perfectly well that the woman he was settling with was a pauper."

In re Margetson and Jones, [1897] 2 Ch. 314, was a case of a similar description. A small sum was paid to a pauper litigant without making any provision for the solicitor's costs; the intention being, as Kekewich, J., put it, "to cheat the solicitors of their costs."

Morgan v. Holland (1877), 7.P.R. 74, was also a case of a settlement made with an indigent plaintiff without proper precaution to protect the solicitor's lien. Proudfoot, J., there says (p. 78), with reference to the extent of the defendant's liability: "Nor do I think that the liability of the defendant should be limited to the amount he paid to the plaintiff. The plaintiff never would have accepted the sum given to him, which was less than the attorneys' bill, had he intended to pay the attorneys, and the defendant knew this, and aided the plaintiff in an endeavour to cheat his attorneys."

The case of *The Hope* (1883), 8 P.D. 144, was one in which the principle was accepted, but the solicitors failed because there was no evidence of any intention to defraud them.

This being the principle, and the onus being upon the solicitors, the evidence requires to be carefully scrutinised. The plaintiff was an impecunious Italian labourer; the defendant is a con-

tractor. During the course of his employment the plaintiff was injured, and lost an arm. The action was tried and resulted in a verdict of \$1,500 damages for the plaintiff. An appeal was had to a Divisional Court of the Appellate Division, with the result that the judgment for the plaintiff was affirmed. A further appeal was had to the Supreme Court of Canada, when a new trial was ordered because of the assumed misconduct of a juror. The case was then entered for the second trial. Security had been given upon the appeal; a motion had been made for the delivery up of this security. This motion failed, as the bond covered the costs of the first trial and the appeal to the Appellate Division, and these costs as well as the costs of the appeal to the Supreme Court were made to abide the result of the new trial.

The plaintiff was known by the defendant to be in abject poverty. The defendant had seen him begging upon the streets of Toronto. The defendant, through his employees, procured the plaintiff to be taken to Simcoe, and he there settled with him for \$400, making no provision for the costs, which he knew would far exceed this sum. The brother of the defendant at once bought for the plaintiff a ticket for transportation to Italy, out of the money paid over, and the plaintiff left for Italy, taking the money with him.

Upon this motion the defendant and his brother have been examined at length, and, with every endeavour to view the defendant's conduct charitably, I cannot avoid being driven to the conclusion that the settlement was collusive, within the definition given in the cases cited. I do not mean to say that I think that the defendant desired to defraud the plaintiff's solicitors. He knew that the costs were heavy. He desired to end the litigation with the least possible expenditure of money. He knew that the plaintiff could not have paid his solicitors. He knew that the plaintiff, when given this money, would not pay his solicitors. He was ready to assist the plaintiff to leave the country without discharging his obligation. He displayed that reckless disregard for the rights of others which amounts to dishonesty, and he acquiesced in, if he did not suggest, the plaintiff's dishonesty.

There is much in the surrounding incidents of the transaction and in the evidence which calls for comment. The defendant is a

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most unsatisfactory witness, and his lack of frankness induces suspicion. His brother appears to be far more truthful, but even in the brother's evidence there are unpleasant features. The fact that the settlement took place behind the back of the defendant's own solicitor, that an outside solicitor was brought in to prepare the documents, that the defendant refuses to give the name of the solicitor employed, because he was regarded "as a gentleman, and he said it was not necessary for him to say;" the fact that the defendant denied all knowledge of how this pauper plaintiff travelled from Toronto to Simcoe, when it appeared that he was taken there by the defendant's employee at the defendant's expense; that the defendant, after all that had taken place, suggested that the plaintiff was still available in Ontario; that it was deemed necessary to have no fewer than seven persons witness the signature to the release; that Moretti, the man who was employed to look up the plaintiff and take him to Simcoe, was regarded as entitled to special reward for his services,*—are all most significant facts.

The order sought will, therefore, be granted with costs.

The defendant appealed from the order of MIDDLETON, J.

March 23. The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

J. M. Ferguson, for the appellant.

H. H. Dewart, K.C. for the respondents.

THE COURT, at the conclusion of the argument, dismissed the appeal with costs, agreeing in the result arrived at and with the reasons given by MIDDLETON, J.

* Mr. Martin Leo McLean, the brother, says this: "At a certain point in this procedure he (Moretti) came to me and says: 'Mr. Leo, me fix Dicarllo all right. Will you give me \$3 a day next summer?' I said, Oh! I guess so, Henry, you are a pretty good man.'"

[APPELLATE DIVISION.]

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March 9.

REX V. WRIGHT.

Liquor License Act—Sale of Beer by Brewer in Local Option Town—Purchaser not a Licensee—Meaning of “Sell” in R.S.O. 1914, ch. 215, sec. 155.

The defendant was the holder of a brewer's provincial license, and carried on the business of a brewer in the town of O., where a local option by-law was in force. F., who lived outside the town, and was not a licensee under the Liquor License Act, sent to the defendant's brewery a messenger who ordered and paid for two dozen bottles of beer to be sent to F.'s house, outside the town. The beer was not then and there appropriated to the order; the defendant delivered it at F.'s house on the following day:—

Held, that there was a “sale” at the town of O., within the meaning of the Ontario Act respecting Brewers' and Distillers' and other Licenses, 62 Vict. ch. 31, sec. 4, as amended by 9 Edw. VII. ch. 82, sec. 47, and 1 Geo. V. ch. 64, sec. 16 (see now sec. 155 of the Liquor License Act, R.S.O. 1914, ch. 215), which forbids such a sale in a municipality in which a local option by-law is in force; and the defendant was properly convicted of an offence against the Liquor License Act.

The word “sell” as used in the statute should not be so interpreted as to mark a rigid distinction between an agreement to sell and a completed sale.

Lambert v. Rowe, [1914] 1 K.B. 38, applied.

APPEAL by the Crown from an order of the Senior Judge of the County Court of the County of Simcoe quashing a conviction of the defendant by the Police Magistrate for the Town of Orillia, for an offence against the Liquor License Act, R.S.O. 1914, ch. 215.

The defendant was the holder of a provincial brewer's license. His brewery was in the town of Orillia, a municipality in which a local option by-law was in force; and the offence charged was selling beer and delivering it at the township of Orillia, also a municipality in which a local option by-law was in force.

February 9. The appeal was heard by FALCONBRIDGE, C.J. K.B., RIDDELL, LATCHFORD, SUTHERLAND, and KELLY, JJ.

J. R. Cartwright, K.C., for the Crown, contended that there was a sale in a local option town to an unlicensed person, within the exception in 62 Vict. ch. 31, sec. 4, as amended by 9 Edw. VII. ch. 82, sec. 47, and 1 Geo. V. ch. 64, sec. 16, now found in R.S.O. 1914, ch. 215, sec. 155. The learned County Court Judge took too technical a view; the proper principle as to the comple-

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tion of a sale is laid down in *Rex v. Clark* (1912), 27 O.L.R. 525. What does the ordinary man understand by a sale? In this case goods were paid for one day and delivered the next. As to what constitutes a sale, see *Lambert v. Rowe* (1913), 23 Cox C.C. 696, [1914] 1 K.B. 38.

A. E. H. Creswicke, K.C., for the defendant, respondent, argued that no sale took place in the town; delivery was made in the township; if there was a sale there, that was not the sale that was charged; and it was not shewn that a local option by-law was in force in the township. There was no evidence that the beer sold was intoxicating. The statute in force at the time of the alleged offence and conviction was 62 Vict. ch. 31, sec. 4, as amended. On the question as to where the sale took place, see *Pletts v. Beattie*, [1896] 1 Q.B. 519, and *Pletts v. Campbell*, [1895] 2 Q.B. 229. If the Crown's contention is right, the respondent, though a licensee, and though he obtained his license after local option was introduced, cannot sell at all.

Cartwright, in reply, referred again to *Lambert v. Rowe*, *supra*, where the *Pletts* cases are considered.

March 9. KELLY, J.:—Albert Wright was charged before the Police Magistrate for the Town of Orillia upon an information that, being the holder of a brewer's provincial license at the town of Orillia, it being a municipality in which a by-law passed under sub-sec. 1 of sec. 41 of the Liquor License Act is in force, he did "sell illegally a quantity of liquor, to wit, beer or ale, and did deliver the same at the township of Orillia, it being a municipality in which a by-law passed under sub-section 1 of section 141 of the Liquor License Act is in force." On the 13th January, 1914, he was thereon convicted.

He appealed to the Senior Judge of the County Court of the County of Simcoe, who quashed the conviction. The present appeal is from that judgment.

The learned Judge found that on the 21st November, 1913, one Fahsa sent \$2 with one William Anderson, who went to the defendant's brewery in the town of Orillia and ordered one dozen of beer and one dozen of porter for Fahsa, to be delivered by the defendant at Fahsa's residence in the township of Orillia;

that there was nothing done at the time about appropriating the beer or porter, but that the defendant sent his man and delivered the two dozen bottles the next day at Fahsa's place in the township of Orillia.

The learned Judge disposed of the matter on the question of what constituted a sale.

The defendant, at the time it is charged the offence was committed, was the holder of a brewer's provincial license, and carried on the business of a brewer in the town of Orillia, where what is known as a local option by-law was then in force. His right to sell liquor was at the time governed by the provisions of an Act respecting Brewers' and Distillers' and other Licenses, 62 Vict. ch. 31, sec. 4, as amended by 9 Edw. VII. ch. 82, sec. 47, and further amended by 1 Geo. V. ch. 64, sec. 16, which declares that "a brewer's provincial license shall be an authority for the holder thereof to sell to persons who are holders of licenses under the Liquor License Act, ale and beer on the premises in or on which they are manufactured in the quantities hereinafter mentioned, and shall authorise him to sell by sample in such quantities to such persons in any municipality in the Province for future delivery. The said license shall also be an authority for the holder thereof to sell ale and beer in quantities as heretofore in the building and license district aforesaid to others than licensees; provided, however, that no such last mentioned sale shall be made either directly or indirectly within any municipality in which a by-law passed under sub-section 1 of section 141 of the Liquor License Act is in force."* Fahsa was not the holder of a license under the Liquor License Act. There was also a finding that a local option by-law was in force in the township of Orillia. I do not think that there was any evidence, or any admission, on which to base that finding. But, in the view which I take of the matter, that finding is immaterial.

The quantity of liquor ordered and delivered to Fahsa was such as the defendant, as a licensed brewer, had the right to sell to persons to whom his license was an authority to sell.

The statute prohibited a sale to any person within the town of Orillia except on the premises on or in which the ale or beer

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was manufactured, and on such premises a sale could legally be made only to holders of a license under the Liquor License Act. Fahsa not being so qualified, it becomes necessary to determine whether what took place at the defendant's premises, or within the town of Orillia, when the liquor was ordered for Fahsa, was a sale within the meaning of the Act.

The position taken by the defendant is, that a sale was not made in the town of Orillia, and if what happened constituted a sale in the township of Orillia, where the goods were delivered, a conviction could not be had, the information not charging that a sale was made in the township, but only that there was a delivery there. The argument on his behalf proceeded on the line that there was in Orillia only a contract for sale at most, if, indeed, there was even such a contract; that there was no transmutation of the property to the purchaser; that there could not be a completed sale until there was an appropriation of the goods and a delivery of them to the purchaser; and, the delivery not being in the town, no sale was made therein. All this is based on the assumption that the test is whether there was a "sale," in the strict legal meaning of that word as used in reference to contracts of sale and purchase. That, however, is too strict a rule to be applied here. It seems to me that the Legislature, in imposing the prohibition which was in force in this town, intended to put restrictions not only on sales actually in all respects completed, but upon the contracting for sale or the doing of the very acts in furtherance of a sale which in the present case are found to have been done in the town, unless to the limited class authorised by the Act.

The case should not be disposed of by so interpreting the word "sell" as to mark a rigid distinction between an agreement to sell and a completed sale where the property has actually passed to the purchaser.

That is the view taken in a number of English cases, a recent one being *Lambert v. Rowe*, [1914] 1 K.B. 38, which turned on the meaning of sec. 13 of the Markets and Fairs Clauses Act, 1847, by which it was made an offence for any person other than a licensed hawker to sell tollable articles at any place within the prescribed limits of a market except in his own place or shop. A

farmer, living within the prescribed limits, on the 13th December delivered to a butcher at a shop, within those limits, two carcasses of pigs (tollable articles), in pursuance of a contract entered into between them on the 9th December, at the farmer's dwelling place, for the sale of the pigs; it was part of the contract that the farmer should kill and deliver the pigs, and that they should be at his risk until delivered. It was held that the word "sale" was to be understood in a popular and not in its strict legal sense; that for the purposes of that section the pigs were sold when the agreement was made, notwithstanding that the property did not then pass; and, the sale being then held to have been made at the farmer's place, the conviction was not upheld. A like conclusion was reached in earlier cases, notably *Stretch v. White* (1861), 25 J.P. 485, cited with approval in *Lambert v. Rowe*.

Pletts v. Campbell, [1895] 2 Q.B. 229, was cited on the argument as opposed to that decision; but, even in that case, which is distinguishable from the present, Wright, J., said that he thought "it is going too far to say that the word 'sell' must necessarily mean a sale in the legal sense: it may be satisfied by an agreement to sell, of which *Stretch v. White* is an illustration."

In my view, the transaction complained of constituted a sale in the town of Orillia, within the meaning of what is prohibited by the Act.

The appeal should be allowed with costs and the conviction sustained.

SUTHERLAND, J., agreed with KELLY, J.

FALCONBRIDGE, C.J.K.B., and RIDDELL, J., agreed in the result.

LATCHFORD, J.:—The defendant was the holder, under the Liquor License Act, now R.S.O. 1914, ch. 215, of a brewer's provincial license. The sales he might make are defined by sec. 155 of that Act. Although his brewery is situate in a municipality where a local option by-law was in force at the time the offence charged was committed, he was nevertheless authorised by his license to sell ale and beer upon the premises to holders of

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licenses under Part I. of the Act, and to sell to such persons anywhere in the Province of Ontario for future delivery. But, by sub-sec. 2 of sec. 155, he was expressly prohibited from selling ale and beer upon his premises within Orillia to any person not a license-holder.

Mr. Wright could thus sell ale and beer within Orillia to any license-holder who chose to purchase from him, and he could, personally or through agents, make sales in any part of Ontario to license-holders for future delivery. The taking of an order is not a sale within the strict technical meaning of the word, but the Act calls it a sale; and, if an order was taken from a person not a license-holder, and a prosecution was instituted, the accused could not be heard to say that he had not made a sale, though delivery might never take place.

Fahsa, for whom the purchase in Orillia was made, was not the holder of a license under Part I. of the Act. If the sale was completed in Orillia, there was an offence against the Act. If the sale was not made until the delivery was effected to Fahsa outside Orillia, there was equally an offence against the Act, as Wright had not authority to deliver ale and beer outside Orillia to any but a license-holder.

The word "sell" in the Act is, in my opinion, used in the popular sense and not in the strict technical sense. This is an inference from the use of the word "sell" as distinguished from the delivery of the same goods. If authority on the point is necessary, it is amply supplied by a number of cases arising in England and Ireland under the Markets and Fairs Clauses Act, 1847, and similar Acts, and the Licensing Act, 1872, which will be found referred to in the recent case of *Lambert v. Rowe*, [1914] 1 K.B. 38.

The transaction which took place at Orillia was a sale within the meaning of the Act, and the conviction should not have been set aside.

The judgment appealed from should, therefore, be reversed, and the conviction affirmed with costs.

Appeal allowed.

[APPELLATE DIVISION.]

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Feb. 5.
March 9.RE MAJOR HILL TAXICAB AND TRANSFER CO. LIMITED AND
CITY OF OTTAWA.

Municipal Corporation—By-law of Police Commissioners for City—Motion to Quash—Jurisdiction—Power of Board to Impose License Fees on Owners and Drivers of Taxicabs—Municipal Act, R.S.O. 1914, ch. 192, sec. 422 (5).

Apart from statute, the Court has no power to quash a municipal by-law; and, power to quash a by-law of a Board of Police Commissioners for a city not being expressly conferred by the Municipal Act, R.S.O. 1914, ch. 192, which, by sec. 422, gives power to such a Board to pass by-laws for certain purposes, the Court declined to assume jurisdiction to quash a by-law passed by such a Board.

Order of LENNOX, J., refusing to quash a by-law of the Board of Police Commissioners for the City of Ottawa, requiring persons and companies carrying on a transfer and taxicab business in the city, and their drivers, to take out licenses, and imposing fees for licenses, affirmed.

Per LENNOX, J.:—The by-law was authorised by the provisions of sec. 422 (5) of the Act.

MOTION by the company to quash a by-law (or part thereof) of the Board of Commissioners of Police of the City of Ottawa.

The motion was heard by LENNOX, J., in the Weekly Court at Ottawa.

W. C. McCarthy, for the company.

F. B. Proctor, for the city corporation.

February 5. LENNOX, J.:—The Dominion letters patent of incorporation referred to (in the argument) authorise the Major Hill Taxicab and Transfer Company Limited, amongst many other things, to carry on the business, in any part of Canada, of “letters to hire . . . of automobiles, motor cars . . . and carriages and vehicles of all kinds,” however propelled, “and to carry on a general garage, livery, and taxicab business, including the business of transferring from place to place goods, wares, merchandise, and persons, by means of vehicles of any kind, drawn or propelled by any kind of power or by any means whatever.”

By these letters patent the company became a body corporate in the several Provinces of the Dominion, and the company’s rights and liabilities as a corporate body within the Province of

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Ontario were recognised by a license of the Provincial Government dated the 30th July, 1912.

This company shews that it has been and is, amongst other things, carrying on the business of letters to hire of motor and other vehicles and a general garage, livery, and taxicab business, including the transfer of goods, wares, merchandise, and persons, for hire, from place to place in the city of Ottawa.

Section 354 of the Municipal Act, R.S.O. 1914, ch. 192, provides that "there shall be for every city . . . a Board of Commissioners of Police:" and sec. 422 enacts that by-laws may be passed by Board of Commissioners of Police of cities: (1) for licensing drivers of cabs; (5) for licensing and regulating the owners of livery stables and of horses, cabs, carriages, carts, trucks, sleighs, omnibuses and other vehicles regularly used for hire within the city, whether such owners reside within or without the city.

A duly constituted Board of Commissioners of Police for the City of Ottawa passed a by-law, No. 35, on the 12th June, 1914, requiring persons and companies carrying on business of the character in which the Major Hill company is engaged, and their drivers, to take out a license, and imposing a fee of \$5 and \$1 respectively for such licenses.

The motion is to have this by-law—so far as it relates to the matters hereinbefore recited—quashed upon the grounds: (1) that the passing of such a by-law is beyond the powers and jurisdiction of the said Board of Commissioners of Police and is *ultra vires*; (2) that the company cannot be compelled to take out an *additional* license.

I am not called upon to consider whether all or any of the provisions of the Extra Provincial Corporations Act of Ontario, R.S.O. 1914, ch. 179, are *intra* or *ultra vires*.

And no question is submitted to me, or arises, as to whether the by-law—assuming jurisdiction—is sufficient in terms to effect the objects and purposes of the Commissioners; and I express no opinion upon that point.

The Major Hill company refused to take out a municipal license, and proceedings were taken which resulted in the imposition of a fine. Although the question of requiring drivers

to pay a municipal license fee is covered by the notice of motion, the substantial question for decision *now* is, whether the company, having a Dominion charter and Provincial license, both involving outlay—taxation of a sort—and conferring rights, is, in common with other companies, firms, and persons engaged in similar callings, liable to an additional tax of the character now sought to be imposed. I think it clearly is. I think the language of sub-sec. 5 of sec. 422 is sufficient to authorise municipalities to exact license fees.

I do not read the decision of their Lordships of the Privy Council in the recent cases *John Deere Plow Co. Limited v. Wharton*, *John Deere Plow Co. Limited v. Duck* (1914), 29 W.L.R. 917, as conflicting with the proper exercise of such a right. Indeed, their Lordships are careful to guard against the inference that their decision is to have so broad an interpretation, and say: "They do not desire to be understood as suggesting that because the status of a Dominion company enables it to trade in a Province and thereby confers on it civil rights to some extent, the power to regulate trade and commerce can be exercised in such a way as to trench, in the case of such companies, on the exclusive jurisdiction of the Provincial Legislatures over civil rights in general. . . . It is enough for the present purposes to say that the Province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the Province restricting the rights of the public in the Province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by Provincial legislation. This conclusion appears to their Lordships to be in full harmony with what was laid down by the Board in *Citizens Insurance Co. v. Parsons* (1881), 7 App. Cas. 96; *Colonial Building and Investment Association v. Attorney-General of Quebec* (1883), 9 App. Cas. 157; and *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575. . . . It is true that, even when a company has been incorporated by the Dominion Government with powers to trade, it is not the less subject to Provincial laws of general application, enacted under the powers conferred by sec. 92. Thus, notwithstanding that a Dominion

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company has capacity to hold land, it cannot refuse to obey the statutes of the Province as to mortmain (*Colonial Building and Investment Association v. Attorney-General of Quebec*, 9 App. Cas. 157, at p. 164); or escape payment of taxes, even though these may assume the forms of requiring, as the method of raising a revenue, a license to trade which affects a Dominion company in common with other companies (*Bank of Toronto v. Lambe*, 12 App. Cas. 575). Again, such a company is subject to the powers of the Province relating to property and civil rights under sec. 92 for the regulation of contracts generally (*Citizens Insurance Co. v. Parsons*, 7 App. Cas. 96).''

The Board of Commissioners of Police exercised a power delegated by the Legislature not only affecting Dominion and Provincial incorporations but all syndicates, partnerships, and individuals alike, engaged in this class of business.

The language of sub-sec. 1, relating to drivers, is not so broad or general as sub-sec. 5 of sec. 422 and sub-sec. 4, and the Provincial licenses required to be obtained individually by drivers of motor cars may afford an indication that the Legislature did not intend to confer the right to exact a license fee from drivers other than those specifically mentioned. The question only incidentally arises upon the motion here; no practical question has yet arisen under this part of the by-law, and such a question may never arise. The city corporation may not seek to enforce it. But the quashing of a by-law—particularly as to a matter for the time being collateral—is to some extent discretionary, and I have concluded that it is better in this case to leave the parties as if this question had not been included in the application.

The motion will be dismissed, but as, in view of my decision to leave the question as to drivers an open question, and as it has not been shewn that the main question has been the subject of direct judicial consideration before, there will be no costs. This may suggest to the Commissioners the propriety of repealing this part of the by-law, if, after consideration, they should be advised that it is broader in its terms than the Municipal Act warrants. The company will have the right to take the deposit out of Court.

The company appealed from the order of LENNOX, J.

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March 9. The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

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W. C. McCarthy, for the appellant company, referred to the Municipal Act, R.S.O. 1914, ch. 192, sec. 422, sub-secs. 1 and 5, and sec. 406, sub-sec. 1, none of which include motor vehicles. The learned Judge below thought that motor vehicles were not cabs, and therefore that there was no power, under sub-sec. 1 of sec. 422, to impose a license on the drivers, but he considered that the term "other vehicles" in sub-sec. 5 is large enough to include motor vehicles. Sub-section 4 includes "motor vehicles." "Motor vehicles" is interpreted in the Motor Vehicles Act, R.S.O. 1914, ch. 207, sec. 2 (b), and nowhere else. Compare the language of sec. 7 of the Travelling Shows Act, R.S.O. 1914, ch. 214, with sec. 420, sub-sec. 5, of the Municipal Act. Further on the question of a license, compare sec. 420, sub-sec. 3, of the Municipal Act, with sec. 9 of the Theatres and Cinematographs Act, R.S.O. 1914, ch. 236; and see 4 Geo. V. ch. 33, sec. 13, adding sec. 406a to the Municipal Act. Ottawa, having a population of only 200,000, does not come under the new regulations. The by-law must come under the Municipal Act; if it does not, it should be quashed.

F. B. Proctor, for the respondent city corporation. The appellant company has no status here. The Court has no power to quash the by-law. The Board of Commissioners of Police is a quasi-corporation, authority to constitute which is conferred upon the city council: R.S.O. 1914, ch. 192, sec. 354; *Young v. Town of Gravenhurst* (1911), 24 O.L.R. 467, at p. 472. The power of Police Commissioners to pass by-laws is given by the Municipal Act, R.S.O. 1914, ch. 192, sec. 422. The power to quash by-laws is given by sec. 283, which does not refer to by-laws passed by Police Commissioners: see Biggar's Municipal Manual (1900), p. 376; *McGill v. License Commissioners of City of Brantford* (1892), 21 O.R. 665; Harrison's Municipal Manual, 5th ed., p. 239, note (b), p. 242, note (k).

McCarthy, in reply, on the question of jurisdiction, referred to sec. 367 of R.S.O. 1914, ch. 192, and to *Winterbottom v. Board*

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of Commissioners of Police of the City of London (1901), 1 O.L.R. 549. The power to quash by-laws of Police Commissioners may be inferred from the group of sections 282 *et seq.* of the Act.

At the conclusion of the argument, the judgment of the Court was delivered by FALCONBRIDGE, C.J.K.B.:—We are all of opinion that the objection taken by Mr. Proctor is well-founded. The jurisdiction to quash a municipal by-law is not an inherent one, but is expressly conferred. We cannot assume jurisdiction by inference or otherwise to quash a by-law of Police Commissioners.

Therefore, without passing upon the reasons for judgment given by the learned Judge in the Court below, we dismiss this appeal with costs.

[This decision resolves the doubt expressed in *McGill v. License Commissioners of City of Brantford*, 21 O.R. 665, cited in the argument.]

[APPELLATE DIVISION.]

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March 9.

REX v. CANADIAN PACIFIC R.W. Co.

Municipal Corporation—Smoke Prevention By-law of Urban Municipality—Municipal Act, R.S.O. 1914, ch. 192, sec. 400, sub-sec. 45—Application to Railway Locomotive Engine—"Flue, Stack or Chimney"—Dominion Railway Company—Municipal Law—Dominion Board of Railway Commissioners.

Section 400, sub-sec. 45, of the Municipal Act, R.S.O. 1914, ch. 192, authorising the councils of urban municipalities to pass by-laws requiring every person who operates or uses any furnace or fire, "to prevent the emission to the atmosphere from such fire of opaque or dense smoke for a period of more than six minutes in any one hour, or at any other point than the opening to the atmosphere of the flue, stack or chimney," does not apply to a locomotive engine: the top of the smoke-stack of the engine, from which is the opening to the atmosphere, is not a "flue, stack or chimney," within the meaning of the section.

Order of MIDDLETON, J., in Chambers, quashing a conviction of the defendant, a Dominion railway company, for an offence against a city by-law passed pursuant to the enactment mentioned, affirmed.

Per MIDDLETON, J.:—The railway company, in its operation, is not subject to the municipal by-law, but is subject to the regulations of the Dominion Board of Railway Commissioners.

MOTION by the defendant company to quash two convictions of the company by a magistrate for alleged offences against a municipal by-law of the City of Ottawa.

December 22, 1914. The motion was heard by MIDDLETON, J.,
in Chambers.

I. F. Hellmuth, K.C., for the defendant company.

J. T. White, for the prosecutor.

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December 28. MIDDLETON, J.:—Under a municipal by-law of the City of Ottawa, No. 3393, sec. 12, certain provision is made for the prevention of a nuisance by smoke emission. The defendant company, in the operation of its railway, discharged smoke from its locomotives in its roundhouse at the city of Ottawa; and, if the railway company is subject to the operation of the by-law in question, the magistrate could convict upon the evidence before him.

But I am of opinion that the railway company, in its operation, is not subject to the municipal by-law, but is subject to the regulations of the Dominion Railway Board. That Board, by its order number 5678, the validity of which is in no way attacked, regulates the discharge from locomotive engines with a view of preventing unnecessary and unreasonable emission therefrom, and the consequent fouling of the atmosphere. This regulation does not differ widely from the by-law in question.

The Dominion authorities having undertaken to pass regulations dealing with this question, the jurisdiction of the municipality, if it ever had any, is, I think, ousted. So long as the railway company complies with the direction of the Board, the municipality cannot interfere. For a violation of the Board's directions, the appropriate prosecution must follow.

This is, I think, something incident to the operation of the railway, and forms part of the railway legislation over which the Dominion alone has control, and it cannot be regarded as mere municipal legislation, within the jurisdiction of the Province. That which was held to be within the provincial jurisdiction in *Canadian Pacific R.W. Co. v. Corporation of the Parish of Notre Dame de Bon Secours*, [1899] A.C. 367, was something quite apart from the operation of the road over which the Dominion had jurisdiction. See *Madden v. Nelson and Fort Sheppard R.W. Co.*, [1899] A.C. 626; *Canadian Pacific R.W. Co. v. The King* (1907), 39 S.C.R. 476.

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The conviction will, therefore, be quashed; under the circumstances without costs and with protection to the magistrate.

The prosecutor appealed from the order of MIDDLETON, J.

March 9, 1915. The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

F. B. Proctor, for the appellant. We are trying to regulate a nuisance under a by-law of the City of Ottawa, No. 3393, sec. 12, passed under the Municipal Act, R.S.O. 1914, ch. 192, sec. 400, sub-sec. 45, and we complain only of a wrongful user. The regulating by-law is of provincial competence: *Canadian Pacific R.W. Co. v. Corporation of the Parish of Notre Dame de Bon Secours*, [1899] A.C. 367; *Madden v. Nelson and Fort Sheppard R.W. Co.*, [1899] A.C. 626. *Canadian Pacific R.W. Co. v. The King*, 39 S.C.R. 476, does not apply, as it is a case of *ultra vires*. The statute and by-law deal with property and civil rights, which are within the provincial powers: *British North America Act*, 1867, sec. 92.

I. F. Hellmuth, K.C., for the defendant company, respondent. The prosecutor should have proceeded under the Dominion Railway Act, R.S.C. 1906, ch. 37, sec. 431, as the Railway Board have jurisdiction under sec. 269(c) to deal with this case. Sections 30 and 269 are mentioned in the by-law. On the question of jurisdiction, see *Attorney-General of Ontario v. Attorney-General for Canada*, [1894] A.C. 189; *Grand Trunk R.W. Co. v. Attorney-General of Canada*, [1907] A.C. 65, at p. 68. See also *Canadian Pacific R.W. Co. v. The King*, 39 S.C.R. at p. 483, on the question of running or operating a railway, and *per Idington, J.* (dissenting), at p. 490. Dominion legislation coming in supercedes provincial: *Russell v. The Queen* (1882), 7 App. Cas. 829. *Canadian Pacific R.W. Co. v. Corporation of the Parish of Notre Dame de Bon Secours*, [1899] A.C. 367, is distinguishable: see p. 373.

Proctor, in reply, referred to the evidence, and again to *Canadian Pacific R.W. Co. v. The King*, 39 S.C.R. at p. 478, distinguishing it.

At the close of the argument, the judgment of the Court was delivered by FALCONBRIDGE, C.J.K.B.:—Without expressing any

opinion as to the reasons given by the learned Judge for his judgment in this case, so elaborately argued before us, we all think that the case falls to be disposed of on the construction of sec. 400, sub-sec. 45, of the Municipal Act, R.S.O. 1914, ch. 192, under which the council assumed to pass the by-law in question. Section 400 provides that "by-laws may be passed by the councils of urban municipalities. . . . 45. For requiring the owner, lessee, tenant, agent, manager or occupant of any premises in, or of a steam boiler in connection with which a fire is burning and every person who operates, uses or causes or permits to be used any furnace or fire, to prevent the emission to the atmosphere from such fire of opaque or dense smoke for a period of more than six minutes in any one hour, or at any other point than the opening to the atmosphere of the flue, stack or chimney."

We think that this sub-section does not apply to a locomotive engine; the opening to the atmosphere is from the top of the smoke-stack of the engine, which is not, in our opinion, a flue, stack or chimney, within the meaning of the section.

The appeal will, therefore, be dismissed with costs.

[BOYD, C.]

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March 9.

Contract—Trade Agreement—Refusal to Enforce—Unreasonable Enhancement of Prices.

An injunction to restrain the defendant from selling goods of the plaintiffs' manufacture except at prices mentioned in an agreement between them, was refused, where the stipulations imposed by the vendor-plaintiffs were such as unreasonably to enhance the price to the purchasing public: the element of crime came in and affected the freedom of contract.

Wampole & Co. v. F. E. Karn Co. Limited (1906), 11 O.L.R. 619, followed.

Elliman Sons & Co. v. Carrington & Son Limited, [1901] 2 Ch. 275, not followed.

MOTION by the plaintiffs for an interim injunction restraining the defendant from selling the goods manufactured by the plaintiffs except at prices mentioned in an agreement between the plaintiffs and defendant.

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March 8. The motion was heard by BOYD, C., in the Weekly Court at Toronto.

S. H. Bradford, K.C., for the plaintiffs.

A. C. McMaster, for the defendant.

March 9. BOYD, C.:—The 5th paragraph of the defendant's affidavit would shew that the profits exacted by the plaintiff to be made by the defendant are greatly in excess of what would be fair and reasonable. The case was not argued on the facts, but rather put upon the law as to whether the English case of *Elliman Sons & Co. v. Carrington & Son Limited*, [1901] 2 Ch. 275, was to be regarded as applicable, or the Canadian case of *Wampole & Co. v. F. E. Karn Co. Limited* (1906), 11 O.L.R. 619. If the right view is, as I think it is, that the stipulations imposed by the vendor-plaintiffs were such as unreasonably to enhance the price to the purchasing public, then the element of crime comes in and affects the freedom of contract which might otherwise exist. That being so, I think it is my duty to follow the *Wampole* case. I would call attention to the fact that this case was followed by Mathers, C.J., in a Manitoba case, *Shragge v. Weidman* (1910), 20 Man. R. 178. He was reversed on appeal in that Province; but his decision was restored by the Supreme Court of Canada: *Weidman v. Shragge* (1912), 46 S.C.R. 1.

The English decision was also not followed by the Supreme Court of the United States in *Miles Medical Co. v. Park & Sons Co.* (1911), 220 U.S. 373, 413, for reasons generally in accord with the lines adopted by my brother Clute in the *Wampole* case.

I refuse the motion for injunction with costs; and I suppose that means the dismissal of the action also.

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RE FASHION SHOP CO.

March 9.

Company—Winding-up—Landlord's Preferential Lien for Rent—Landlord and Tenant Act, R.S.O. 1914, ch. 155, sec. 38—Voluntary Assignment for General Benefit of Creditors before Winding-up Order—Assets Taken by Liquidator Subject to Preferential Lien—Winding-up Act, R.S.C. 1906, ch. 144, secs. 5, 23, 133.

The words "the preferential lien of the landlord for rent," in sec. 38 of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, in regard to the case of an assignment for the general benefit of creditors by a tenant, mean that the landlord has a statutory lien upon goods available for distress, independent of actual distress or possession, for the amount of the rent as limited by the section.

Lazier v. Henderson (1898), 29 O.R. 673, 679, and *Tew v. Toronto Savings and Loan Co.* (1898), 30 O.R. 76, followed.

Where an incorporated company made an assignment for the general benefit of creditors, its assets in the hands of the assignee became subject to the preferential lien of its landlord for rent; and a winding-up order under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, being subsequently made, these assets became vested in the liquidator, subject to the preferential lien of the landlord for the limited amount of rent.

Sections 5, 23, and 133 of the Winding-up Act considered.

Re Clinton Thresher Co. (1910), 15 O.W.R. 318, 1 O.W.N. 445, applied.

Fuches v. Hamilton Tribune Co. (1884), 10 P.R. 509, distinguished.

APPEAL by the liquidator of the company, in process of winding-up under the Winding-up Act, R.S.C. 1906, ch. 144, from the finding of the Master in Ordinary, in the course of the reference, that the company's landlord was entitled in the distribution of the assets to priority in respect of his claim for rent.

March 8. The appeal was heard in the Weekly Court at Toronto.

A. C. McMaster, for the appellant.

L. F. Heyd, K.C., for the landlord.

March 9. *Boyd, C.*:—"In the case of an assignment for the general benefit of creditors by a tenant the preferential lien of the landlord for rent shall be restricted to the arrears of rent due during the period of one year next preceding, and for three months following, the execution of the assignment:" Landlord and Tenant Act, R.S.O. 1914, ch. 155, sec. 38.

The phrase "the preferential lien of the landlord for rent"

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means, as construed by decisions binding on me, that the landlord has a statutory lien upon goods available for distress, independent of actual distress or possession, for the amount of the rent as limited by the section: *Lazier v. Henderson* (1898), 29 O.R. 673, at p. 679; *Tew v. Toronto Savings and Loan Co.* (1898), 30 O.R. 76.

This was the condition of the assets in the hands of the voluntary assignee under the debtor's general assignment of the 28th December, 1914, and such was the plight of affairs when the notice was served on the 31st December of a petition to wind up the company. At that date the winding-up proceedings "shall be deemed to commence:" R.S.C. 1906, ch. 144, sec. 5.

After the winding-up order is made (in this case on the 8th January, 1915), every attachment . . . distress or execution put in force against the effects of the company shall be void: sec. 23. And, by sec. 133, all remedies sought for enforcing a privilege, mortgage, lien or right of property upon, in or to any effects in the hands of the liquidator, may be obtained by an order of the Court on summary petition.

Here no distress was needed to create the statutory preferential lien which arose by virtue of the Landlord and Tenant Act upon the execution by the tenant of the assignment for creditors. That preferential lien existed, I think, *quoad* the particular goods which afterwards became vested in the liquidator (who happens to be the same person as the voluntary assignee). The goods became subject to the winding-up order, charged with the preferential lien as to the limited amount of rent; and, if any order of the Court is required to make that lien available, it should be granted *nunc pro tunc*.

Substantially the same state of affairs arose in *Re Clinton Thresher Co.* (1910), 15 O.W.R. 318, 1 O.W.N. 445, under mechanics' liens created before the winding-up, and I held that the efficacy of the lien was not disturbed, as the estate came into the hands of the liquidator subject thereto.

The great distinction between the present case and *Fuches v. Hamilton Tribune Co.* (1884), 10 P.R. 509, is, that there the claim was by a landlord who had not distrained before the winding-up proceedings; but here the fact of the voluntary

assignment intervened, which operated as a statutory lien in favour of the landlord, despite the absence of a distress.

The Master's report should be affirmed with costs.

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March 9.

Mortgages—Executions—Distribution of Moneys Realised from Judicial Sale of Land—Priorities—Application and Effect of Creditors Relief Act, R.S.O. 1914, ch. 81.

The Creditors Relief Act should not be made to apply by analogy to a scheme for the equitable distribution among subsequent mortgagees and execution creditors of a fund made available for the satisfaction of creditors and mortgagees by the intervention of the Court in a suit to have a transfer of land declared void as to creditors.

The direction of the Act referred to, R.S.O. 1914, ch. 81, sec. 33, sub-secs. 11 and 12, is that the groups of execution creditors shall be gathered in one scheme of distribution (irrespective of the different mortgages) and the proceeds of the sale divided ratably among all as on an equal footing; and the effect is to pay a subsequent mortgage in full by reducing the amount of prior executions, thus giving to a subsequent mortgage a better status as against a prior execution charged on the land than existed when the mortgage transaction was effected between the owner and the mortgagee.

That method should not be extended to the distribution of assets in the hands of the Court; and in this case, where there was a succession of mortgages registered at different dates, with groups of executions in the intervals between the different mortgages, priority of payment was directed according to priority of date, the executions intervening between the mortgages being grouped.

Roach v. McLachlan (1892), 19 A.R. 496, and *Breithaupt v. Marr* (1893), 20 A.R. 689, followed.

APPEAL by the defendant J. R. Douglas and other defendants, execution creditors and a mortgagee, from the report of the Local Master at Ottawa upon the distribution of the proceeds of the sale of land under a judgment of the Court.

The appeal was heard in the Weekly Court at Ottawa.

T. A. Beament, for the appellants.

J. F. Smellie, for the plaintiffs, execution creditors.

J. F. Orde, K.C., for the Ontario Bank, execution creditors.

W. D. Hogg, K.C., for La Banque Nationale, mortgagees.

March 9. BOYD, C.:—The moneys to be distributed in this case were made available for the satisfaction of creditors and

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incumbrancers by the intervention of the Court in a suit to have a transfer of the property (land) declared void as to creditors. The land was sold subject to the claims of prior mortgagees—prior, that is, to the date of the first execution. The proceeds of the sale are to be distributed among those entitled according to their priorities. Those entitled may be classified thus: first in time, execution creditors having charges on the land; second, the claim of La Banque Nationale under a subsequent mortgage; thirdly, a group of creditors whose executions are later in date than this mortgage; fourthly, another later mortgage to one Douglas and another to one Bickell; fifthly, another group, still later in date, of execution creditors; then, a fourth subsequent mortgage to the Traders Bank; and, lastly, another group of creditors whose executions are in the hands of the Sheriff. The amount realised by the sale is enough to pay in full the first group of executions, also the bank mortgage, and probably the next group of execution creditors. The Master has in this way settled the priorities and the manner of payment. It is objected on the appeal that the Master should have followed the directions given to Sheriffs in the Creditors Relief Act, R.S.O. 1914, ch. 81, sec. 33, sub-secs. 11 and 12.* The meaning imputed to that statute is that the groups of execution creditors should be gathered in one scheme of distribution (irrespective of the different mortgages) and the proceeds of the sale divided ratably among all as on an equal footing. The result would thus probably be that the bank mortgage would be paid in full, and

* (11) Where a debtor has executed a mortgage or other charge, otherwise valid, upon his property or any part thereof after the receipt of an execution by the Sheriff and before distribution, such mortgage or charge shall not prevent the Sheriff from selling the property under any execution or certificate placed in his hands before distribution as if such mortgage or charge had not been given, nor prevent creditors whose executions or certificates are subsequent thereto from sharing in the distribution; but in distributing the money realised from the sale of such property the Sheriff shall deduct and pay to the person entitled thereto the amount of such mortgage or charge from the amount which would otherwise be payable out of the proceeds of such property to such subsequent creditors.

(12) In the case provided for in the next preceding sub-section the Sheriff shall prepare a separate scheme of distribution of the proceeds of the incumbered property without reference to the mortgage or charge, and, from the dividends payable according to such scheme to subsequent creditors, there shall be deducted the amount of the mortgage or charge, and the amount so deducted shall be paid to the incumbrancer.

the execution creditors prior to this mortgage would receive a fraction of their charges. One obvious answer to this is, that the first execution creditors are prior to that mortgage, and the second execution creditors are subsequent to that mortgage, and so have their charge on a different estate in the land, lessened in value by the amount of the mortgage.

The Act does not appear to contemplate such a state of things as here exists: a succession of mortgages registered at different dates with groups of executions in the intervals between the different mortgages. The effect of the Act appears to be to pay a subsequent mortgage in full by reducing the amount of a prior execution, and this gives to a subsequent mortgage a better status as against a prior execution charged on the lands than existed when the mortgage transaction was effected between the owner and the mortgagee. If this is the meaning and result of the Act, I do not feel disposed to extend its methods to the distribution of assets in this Court.

I do not think the analogy of the statute should be imported into these equitable proceedings. If the bank mortgage had been enforced by suit, the subsequent executions would have been wiped out if the creditors had not redeemed; and, if foreclosure ensued, that would leave the prior executions in full force. When the mortgage was made, it was subject to the existing executions, and there was no equity to have that mortgage paid out of the land in priority to the prior charges. The course of the Court is well settled and is carefully expounded in the cases cited and followed by the Master of *Roach v. McLachlan* (1892), 19 A.R. 496, and *Breithaupt v. Marr* (1893), 20 A.R. 689.

The appeal is dismissed with costs.

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[APPELLATE DIVISION.]

March 10.

DOWDY V. GENERAL ANIMALS INSURANCE CO.

Insurance—Animal Insurance—Misstatements of Fact in Application-form Filled in by Agent of Insurer, without Knowledge of Assured—Construction of Application and Policy—Adoption of Insurer's Agent as Agent of Assured—Fraud of Agent—Mistake in Proofs of Loss.

The plaintiff, being solicited by H., an agent of the defendants, an insurance company, to insure a horse, agreed; and H., producing an application-form, filled it in without asking the plaintiff for information (except in a few matters). The plaintiff believed that H. knew his business and that what he was writing was true, and signed, at H.'s request, without knowledge of the falsity of some of the statements. On the application were printed the words: "Any false statement in this application annuls the policy." The application contained a question put to the applicant, whether he accepted the agent of the company as his agent and accepted responsibility for what was set forth in the application; to this H., without the plaintiff's knowledge, inserted an answer "Yes." A policy issued, having on its face the statement that the application was made a part of the policy and a warranty on the part of the assured; and condition 1 stated that the policy should be void if any fact or circumstance relating to the risk had not been fully and truly stated to the company *by the assured*. Certain of the statements were misstatements, but not to the knowledge of the plaintiff. The horse died, and claim papers were put in containing similar misstatements; the plaintiff was not aware of the inaccuracies, the papers having been drawn up from the policy by a solicitor:—

Held, in an action to recover the amount of the insurance, that the provisions contained in the application and policy were to be read together, and most strongly against the defendants; and, so read, the policy was to be void only on the untrue statement *of the assured*, and not of one who was in fact the agent of the defendants, though technically perhaps and for a special purpose acting for the assured.

Semble, that the insurer cannot take advantage of the clause making the insurance agent agent for the applicant where the applicant is misled by the agent's fraud; and, if *Hastings Mutual Fire Insurance Co. v. Shannon* (1878), 2 S.C.R. 394, and *Biggar v. Rock Life Assurance Co.*, [1902] 1 K.B. 516, are in conflict, the former case should be followed.

And *held*, that there was no fraud but only mistake in the proofs of loss.

The fraud of H. could not be imputed to the plaintiff, and he was entitled to recover.

Judgment of the County Court of the County of Wentworth affirmed.

APPEAL by the defendants from the judgment of the County Court of the County of Wentworth in favour of the plaintiff, upon the findings of a jury, in an action upon a policy issued by the defendants insuring the plaintiff's horse.

The defence was based upon the untruth of the statements in the application for the policy, signed by the plaintiff. The application form was filled up by one Hall, an agent of the defendants; and the defendants alleged that, by the terms of

the policy, Hall was adopted by the plaintiff as his agent, and that the plaintiff was bound by what was contained in the application.

February 19. The appeal was heard by FALCONBRIDGE, C.J. K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

George Wilkie, for the appellants, argued that, even if the findings of the jury are accepted, the plaintiff is not freed from liability under the warranty contained in the policy. The statements in the application are made the basis of the policy, and by the answer to the 29th question the plaintiff accepted Hall as his agent for the purpose of writing in the particulars: *Thomson v. Weems* (1884), 9 App. Cas. 671, 689; *Biggar v. Rock Life Assurance Co.*, [1902] 1 K.B. 516, which is absolutely on all fours with the case at bar; *New York Life Insurance Co. v. Fletcher* (1886), 117 U.S. 519. [RIDDELL, J., referred to *Hastings Mutual Fire Insurance Co. v. Shannon* (1878), 2 S.C.R. 394, as an authority against the appellants' view.] The *Biggar* case is based upon an American case of high authority, and should be influential. The cases are collected in Lavery's Insurance Law of Canada, p. 520. *Bawden v. London Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q.B. 534, which will be relied upon by the respondent, is distinguishable, as will be seen by reference to the *Biggar* case. Reference was also made to *Wells v. Smith* (1914), 30 Times L.R. 623, at p. 624; *Thomson v. Maryland Casualty Co.* (1906), 8 O.W.R. 598, 601.

C. W. Bell, for the plaintiff, respondent, referred to Lavery, *op. cit.*, p. 521. A fraud was worked by the agent, Hall, for which the plaintiff was in no way responsible, and of which he had no knowledge. He relied upon the *Shannon* case, 2 S.C.R. 394, especially at p. 405. He also referred to *Newcastle Fire Insurance Co. v. Macmorran and Co.* (1815), 3 Dow 255.

Wilkie, in reply, distinguished the *Shannon* case; there the inaccurate statements were held to be the work of the company's agent, for which they were responsible.

March 10. The judgment of the Court was delivered by RIDDELL, J.:—The plaintiff had been a teamster in the employ of the Dominion Power Company. He took ill, and after com-

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ing out of the hospital expressed a desire to the manager of the company to go into teaming on his own account, as the company's work was too hard for him. The manager, in view of his former services, "practically gave him" a team of horses for \$100. One of these, "Duke," took sick, and Hall, a veterinary surgeon, was called in to attend him. After the horse had been cured, Hall, who was the agent of the defendants, the General Animals Insurance Company, urged the plaintiff more than once to insure the animal. After some demur, the plaintiff agreed, and Hall, producing an application, filled it in without asking the plaintiff for information (except in a very few matters). The plaintiff believed that Hall knew his business and that what he was writing was true, and signed, at Hall's request, without knowledge of the falsity of some of the statements.

On the application is printed in plain letters the statement: "Any false statement in this application annuls the policy." The application also contains the following question: "29. Do you accept to be alone responsible for the correctness of the description and other particulars set forth in this application, and if the whole or any portion of the same be written by a canvasser, agent or employee of the company or by any other person whatsoever, do you accept to consider same as your agent writing for and on your behalf?" And Hall, without the plaintiff's knowledge, inserted an answer "Yes."

A policy issued, having on its face the statement that the application "is . . . made a part of this policy and a warranty on the part of the assured;" and condition 1 reads: "This policy shall be void if any fact or circumstance relating to this risk has not been fully and truly stated to this company by the assured."

Certain of the statements were undoubtedly misstatements, but not to the knowledge of the assured.

The horse died, and claim papers were put in containing similar misstatements. The papers had been drawn up from the policy by a solicitor, and the plaintiff was not aware of the inaccuracies.

The defendants refused to pay; the plaintiff sued, and at the

trial before His Honour Judge Snider and a jury, the jury found in favour of the plaintiff, and judgment went for the full amount, \$200, and costs. The defendants now appeal.

Notwithstanding the clause in the application apparently making the insurance agent agent for the applicant, the Supreme Court of Canada seem to have decided that the insurer cannot take advantage of this where the applicant is misled by the agent's fraud: *Hastings Mutual Fire Insurance Co. v. Shannon*, 2 S.C.R. 394, at p. 408; and, if *Biggar v. Rock Life Assurance Co.*, [1902] 1 K.B. 516, is opposed to this view, we should follow our own Court. I think, however, we need not pass upon this point, but can decide the case on another ground.

In the application (as we have seen) it is specifically stated that "any false statement . . . annuls the policy," the application is made a warranty, and it is provided that the policy is to be void if any circumstances shall not have been truly stated *by the assured*. All these provisions are, I think, to be read together, they are all *in pari materiâ*, there is no possible need for or use in the last if it is not to modify the two former. Remembering that the language of a policy must be read most strongly against the insurance company whose language it is, I think the policy is to be void only on the untrue statement of the assured, and not of one who is in fact the agent of the company, but technically perhaps and for a special purpose acting for the assured. If this be not the meaning, the words "by the assured" are wholly unnecessary and useless.

The assured made full and true disclosure of everything about which he was asked, and I do not think the fraud of Hall can be imputed to him; and there was no fraud but only mistake in the proofs of loss.

Appeal dismissed with costs.

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[BOYD, C.]

March 10.

RE WARD.

Will—Construction—Vested Interest—Enjoyment Postponed for Benefit of Estate.

A clause in a will provided that the residue of the testator's property "be sold at such time and in such manner as may seem to my trustees best for my estate, if being left to their absolute discretion at what time and on what terms they shall sell any of my said property, and on realising the same or any portion thereof to divide the proceeds among my wife and . . . children." The widow died before any of the residue of the property had been sold:—

Held, that the share of the widow was vested, although the enjoyment was postponed, the postponement being for the benefit of the estate.

Packham v. Gregory (1845), 4 Hare 396, followed.

MOTION by the National Trust Company Limited, executors and trustees under the will of William Ward, deceased, for an order determining two questions arising upon the will.

William Ward died on the 24th January, 1912, leaving a widow (his second wife), a son by his first marriage, Frank Ward, seven sons and daughters by his second wife, and one grandchild, the daughter of a daughter by the second wife. The grandchild and one child were infants. The will was dated the 21st October, 1911.

The question to be determined arose upon this clause of the will: "All the rest and residue of my property real and personal I give . . . to my trustees . . . to be held on the trusts thereafter mentioned, namely—firstly, to sell and convert into cash all my property . . . such property to be sold at such time and in such manner as may seem to my trustees best for my estate, it being left to their absolute discretion at what time and on what terms they should sell any of my said property, and on realising same or any portion thereof to divide the proceeds among my wife and my aforesaid children and my said grandchild, each of them taking one equal share thereof, the share of any child or grandchild under age to be retained by my said trustees until he or she reaches that age."

The widow died on the 8th May, 1913, before any of "the rest and residue of the property" had been sold or realised.

The questions propounded were: (1) whether the widow took

any interest at the time of her death in the residue of the property not then sold or realised; and (2), if she had any interest in such residue, whether on her death the same was redivisible among the children of William Ward mentioned in the will and the grandchild, or whether the same belonged to the personal estate of the widow and should be divided among her children only, she having died intestate.

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March 10. The motion was heard by BOYD, C., in the Weekly Court at Toronto.

W. H. Lockhart Gordon, for the applicants and the adults interested under the will except Frank Ward, submitted the question whether, under the wording of the will, the widow took a vested or contingent interest. He pointed out that no income was given by the will to the beneficiaries, and that there was no direct gift even of the residue, but simply a direction to the trustees to sell the estate and divide the same among the beneficiaries when sold and realised. He referred to *Kirby v. Bangs* (1900), 27 A.R. 17.

F. W. Harcourt, K.C., Official Guardian, for the infant Reginald Ward, son of the testator, contended that the widow had a vested interest in the residue at the time of her death which would pass to her legal representatives.

H. C. Fowler, for Frank Ward, and also (by appointment of the Court) for Gladys Large, the infant grandchild, contended that the widow took only a contingent interest, which lapsed at her death, the property not having been sold and realised until after her death. He referred to *Jarman on Wills*, 6th ed., p. 1402; also to the cases given in note (f) at p. 1403, and especially to *Leake v. Robinson* (1817), 2 Mer. 363, 386, 387, and *In re Edwards*, [1906] 1 Ch. 570. He argued that the principle of these cases should be applied in interpreting this clause.

March 10. BOYD, C.:—The clause in doubt in this will reads thus: "The residue . . . to be sold at such time and in such manner as may seem to my trustees best for my estate, it being left to their absolute discretion at what time and on what terms they shall sell any of my said property, and on realising the

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same or any portion thereof to divide the proceeds among my wife and . . . children." True it is the enjoyment is to be only after the sale, and the widow was then dead, and so could not take personally; but, if the whole tenor of the will shews that the postponement was intended to serve the best interests of the estate, the prospective benefit will be construed as vested in the beneficiary, though death may come before the actual enjoyment. In this will the testator delegates to the trustees the trust of selling the estate when it shall seem to them "best for the estate," and that is the testator's reason for not having the residue sold and divided at once.

This language is sufficient under the authority of *Packham v. Gregory* (1845), 4 Hare 396, 397, as I read this will, to warrant the declaration that the share of the deceased widow in the residue was vested and would pass to her next of kin as part of her estate, she having died intestate.

Wigram, V.-C., said in the case in Hare: "If there is a gift to a person . . . on the happening of any event . . . or a direction to pay and divide when a person attains 21 . . . there is no gift . . . except in the direction to pay, and the person to take must come within the particular description. But if, upon the whole will, it appears that the future gift is only postponed to let in some other interest, or, as the Court has commonly expressed it, for the benefit of the estate, the same reasoning has never been applied to the case. The interest is vested notwithstanding, although the enjoyment is postponed."

Costs from the estate.

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[APPELLATE DIVISION.]

March 11.

BUFF PRESSED BRICK CO. v. FORD.

Company—Original Subscriber for Shares and Petitioner for Incorporation
—*Liability for Calls—Subscription Procured by Fraud of Promoter.*

If shares in a company be subscribed for on the faith of a prospectus, the shares issued on such a subscription, if it is fraudulent and the fraud induces the subscription, are not to be forced upon the subscriber, for the prospectus is the basis of the contract for shares, and the company by issuing stock thereon ratifies and adopts the prospectus, even where it is issued before incorporation. But where a person petitions for a charter and becomes an original shareholder named as such in the charter, the

same rule does not apply; any misrepresentation made is the act of a promoter, not the company; the company, not being in existence, cannot make any misrepresentation, and there is no ratification by the company.

In re Metal Constituents Limited, [1902] 1 Ch. 707, followed.

Judgment of MULOCK, C.J.Ex., dismissing an action brought by an incorporated company, against an original subscriber and corporator, to recover money due in respect of calls properly made, upon the ground that the defendant had been induced to subscribe by the fraud of a promoter, reversed.

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APPEAL by the plaintiff company from the judgment of MULOCK, C.J.Ex., after trial of the action without a jury, dismissing it with costs.

The action was brought by an incorporated company, against an original subscriber for shares and a corporator, to recover money due in respect of calls upon the shares. The defence was, that the defendant had been induced to subscribe by the fraud of a promoter.

March 10. The appeal was heard by FALCONBRIDGE, C.J. K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

S. H. Slater, for the appellant company, argued that, as the defendant was a corporator and director of the company, and had signed the petition for letters patent, he was liable: *In re Metal Constituents Limited*, [1902] 1 Ch. 707, and cases cited there.

E. E. Gallagher, for the defendant, respondent, argued that the defendant was not liable, and referred to *Karberg's Case*, [1892] 3 Ch. 1. [RIDDELL, J.: See Palmer's Company Law, ed. of 1911, p. 36.] *In re Metal Constituents Limited* does not overrule *Karberg's Case*, the former being a decision of a single Judge.

March 11. RIDDELL, J.:—One Brinker, engaged in promoting a brick company, is said by the defendant to have committed a fraud upon him by concealing his interest in the matter, and thereby to have induced the defendant to take a share in the proposed enterprise. The defendant with others signed a petition to the Lieutenant-Governor asking for a charter, the defendant being a subscriber for ten shares; the charter was granted in January, 1914, and names the defendant as one of the corporators.

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Calls were properly made upon the stock: the defendant refused to pay; and this action was brought. He defended on the ground that he had been induced to subscribe by the fraud of the promoter: and the case came down for trial before the Chief Justice of the Exchequer at Hamilton, without a jury.

The learned Chief Justice found the facts in favour of the defendant, and dismissed the action. The plaintiff company now appeals.

There is no doubt that if shares are subscribed for on the faith of a prospectus, shares issued on such a subscription, if it is fraudulent and the fraud induces the subscription, are not to be forced upon the subscriber, "for the prospectus is the basis of the contract for shares," and the company by issuing stock thereon ratifies and adopts the prospectus: *Pulsford v. Richards* (1853), 17 Beav. 87; *Jennings v. Boughton* (1853), 17 Beav. 234; and it makes no difference if the prospectus be issued before incorporation: *Karberg's Case*, [1892] 3 Ch. 1. See also *Henderson v. Lacon* (1867), L.R. 5 Eq. 249; *Ross v. Estates Investment Co.* (1868), L.R. 3 Ch. 682; *Lynde v. Anglo-Italian Hemp Spinning Co.*, [1896] 1 Ch. 178; *Roussell v. Burnham*, [1909] 1 Ch. 127; *In re Pacaya Rubber Co.*, [1914] 1 Ch. 542.

But where a person petitions for a charter and becomes an original shareholder named as such in the charter, the same rule does not apply. Any misrepresentation made is the act of a promoter, not the company; the company, not being in existence, cannot make any misrepresentation, and there is no ratification (if there could under the circumstances here be ratification) by the company: *In re Northumberland Avenue Hotel Co.* (1886), 33 Ch. D. 16; *In re Rotherham Alum and Chemical Co.* (1883), 25 Ch. D. 103; *Clinton's Claim*, [1908] 2 Ch. 515.

The matter came up squarely in *In re Metal Constituents Limited*, [1902] 1 Ch. 707, where the decision is rested both on the ground I have stated and on the ground that, by signing the memorandum, the applicant became bound, not only as between himself and the company, but as between himself and the other persons who should become members.

The distinction between the cases of a shareholder who is allotted stock by the company and one who is a petitioner and a

charter member was not present to the mind of the learned Chief Justice, but it is thoroughly established and is unassailable on principle or authority.

In this view, it is unnecessary to consider whether the alleged misrepresentations were in fact made, or, if made, whether they were such as would give the defendant the right to repudiate.

I am of opinion that the appeal should be allowed with costs and judgment entered for the plaintiff company for the amount sued for with costs.

FALCONBRIDGE, C.J.K.B., and LATCHFORD and KELLY, JJ., agreed in the result.

Appeal allowed.

[APPELLATE DIVISION.]

TORONTO ELECTRIC LIGHT CO. v. CITY OF TORONTO.

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March 15.

Contract—Municipal Corporation—Electric Light Company—Overhead System—Erection of Poles in Highways—45 Vict. ch. 19, sec. 2—"Upon"—Condition Precedent—Making of Agreement—Delegation by Legislature to Municipal Authorities of Power to Grant or Withhold Right to Use Highways—"Franchise, Right, or Privilege"—Corporate Act—Discretion—Absence of Express Assent—Acquiescence—Estoppel—Lost Grant—Mistake—Agreement as to Underground System—Construction and Effect—Recitals—Limited Special Permission.

The judgment of MIDDLETON, J., 31 O.L.R. 387, restraining the defendant corporation from removing the plaintiff company's poles from certain city streets, was reversed; GARROW, J.A., dissenting.

Held, by the majority of the Court, that the word "upon," as used in sec. 2 of 45 Vict. ch. 19, "An Act respecting Companies for supplying Electricity for the purposes of Light, Heat, and Power," means that what that section prescribes is a condition precedent to the exercise by the company of the right to conduct electricity through, under, and along the streets, highways, and public places of the municipality.

The Queen v. Justices of Lancashire (1857), 8 E. & B. 563, applied.

And what the section prescribes is, that a company shall not have the right to conduct electricity through, under, and along the streets, highways, and public places of the municipality until it shall have entered into an agreement with the corporation of the municipality by which it shall be authorised to do so upon such terms and conditions as the corporation may impose.

The Legislature thus delegated to the municipal authorities the power which it possessed of granting or withholding the right to use the streets, highways, and public places of the municipality, and of determining the terms and conditions upon and subject to which the right should be exercised, if it were determined to grant it.

This involved legislative action by the municipal authorities; and the acquisition by a company, by mere active or passive acquiescence on the part

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of the officials or servants of the corporation of the municipality, of the right to use the streets, highways, and public places without the consent or permission of the corporation or the making of the agreement for which sec. 2 provides, was not contemplated by the Legislature.

Ghee v. Northern Union Gas Co. (1899), 158 N.Y. 510, 513, approved and applied.

British Columbia Electric R.W. Co. Limited v. Stewart, [1913] A.C. 816, 14 D.L.R. 8, explained and distinguished.

(2) Where a company exercises its statutory rights under such legislation as that by which the plaintiff company's powers are declared, the giving of the consent of the municipal authorities to the exercise of them, wholly or in part, or unconditionally or conditionally, is usually spoken of and treated, on this side of the Atlantic, as the conferring of a franchise or the granting of a right or privilege; and it is in that sense, and not according to their technical meaning, that the words are used by Legislatures.

(3) The power vested in the municipality by sec. 2 cannot be effectively exercised otherwise than by a corporate act—that is, an act done by the corporation itself under the authority of its municipal council—not necessarily by by-law.

Township of Pembroke v. Canada Central R.W. Co. (1882), 3 O.R. 503, and cases following it, distinguished.

What the Legislature did was to repose in the municipal authorities a trust and to impose upon them a duty to safeguard the public interests of the locality over which they had jurisdiction; and the public could not, by the application of the doctrine of estoppel or by laches or acquiescence, be deprived of the protection which the Legislature provided for them by sec. 2, merely because the municipal authorities, through carelessness or otherwise, had failed in the performance of their duty—the municipal authorities had a discretion, but the right could not be effectively granted unless or until they had exercised that discretion by some corporate or legislative act.

(4) There never was any express assent by the defendant corporation to the exercise by the plaintiff company of its statutory powers to make use of the streets, highways, and public places of the municipality; and neither on the ground of laches or acquiescence on the part of the defendant corporation nor of estoppel nor on the fiction of a lost grant was the plaintiff company entitled to succeed.

The plaintiff company was never under any mistake or misapprehension as to its legal rights, and did not extend its operations or expend its money under the mistaken view that it had obtained the consent of the appellant to the exercise by it of the powers and rights to use the streets, highways, and public places, which the statute conditionally conferred.

(5) The agreement of the 13th November, 1889, relating to underground conduits, properly construed, did not amount to a recognition by the defendant corporation of the right of the plaintiff company to use the streets, highways, and public places of the city for the purposes of its overhead system, nor did it contain an express grant of that right; the recitals in it were to be treated as having reference to the overhead system which had been established and was being used within the section of the city mentioned in the agreement of the 30th August, 1883, and to the overhead system in use for street lighting; and the right granted was the right to establish and maintain an underground system, and that only.

(6) The plaintiff company had the right to use, for the purposes mentioned in sec. 2, any of the streets, highways, or public places of the city for the purposes of an underground system, under and subject to the terms and conditions of the agreement of the 13th November, 1889; but for the purposes of an overhead system it had no right to use any of the streets, highways, or public places except such of them as lay within the section of the city mentioned in the agreement of the 30th August, 1883,

and such of them as to which a special permission was given, and, as to these, subject to the terms and conditions of the agreement by which the permission was granted.

Per GARROW, J.A. (dissenting):—The circumstances of the case justified the plaintiff company's contention that from the beginning it had, or at least in good faith believed it had, the actual consent of the defendant corporation to the use which was being made of the streets for the purposes of the plaintiff company's overhead system, and that the defendant corporation, in fact if not in form, was consenting, and intended the plaintiff company to believe, or so acted as to lead it honestly to believe, that it was consenting, and that a formal consent need not be obtained.

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APPEAL by the defendant, the Corporation of the City of Toronto, from the judgment of MIDDLETON, J., 31 O.L.R. 387.

October 23, 26, 27, and 28, 1914. The appeal was heard by MEREDITH, C.J.O., GARROW, MAGEE, and HODGINS, J.J.A.

G. R. Geary, K.C., and C. M. Colquhoun, for the appellant. Where rights are subject to a by-law, there can be no estoppel: *Saunby v. London Water Commissioners*, [1906] A.C. 110. There must be strong evidence to warrant the finding of an estoppel, where one is looking on and seeing another spend money: *Dann v. Spurrier* (1802), 7 Ves. 230. No estoppel is possible in this case, for there was merely an agreement as to underground wires. The following cases were referred to: *Carpenter v. Buller* (1841), 8 M. & W. 209; *Heath v. Crealock* (1874), L.R. 10 Ch. 22; *Ex p. Morgan* (1875), 2 Ch. D. 72; *South Eastern R.W. Co. v. Warton* (1861), 6 H. & N. 520; *Right dem. Jefferys v. Bucknell* (1831), 2 B. & Ad. 278; *Onward Building Society v. Smithson*, [1893] 1 Ch. 1, at pp. 10, 11; *General Finance Mortgage and Discount Co. v. Liberator Permanent Benefit Building Society* (1878), 10 Ch. D. 15; *Low v. Bouverie*, [1891] 3 Ch. 82, at p. 106. On the question of the territorial limits of the city, reference was made to *Toronto R.W. Co. v. City of Toronto* (1906), 37 S.C.R. 430; *S.C., sub nom. Toronto Corporation v. Toronto R.W. Co.*, [1907] A.C. 315.

I. F. Hellmuth, K.C., for the plaintiff company, respondent, on the question of estoppel, referred to *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52; *Bell Telephone Co. v. Town of Owen Sound* (1904), 8 O.L.R. 74; *Black v. Winnipeg Electric R.W. Co.* (1907), 17 Man. R. 77; *City of Montreal v. Montreal Street R.W. Co.* (1904), 34 S.C.R. 459; *S.C., sub nom. Montreal Street R.W. Co. v. City of Montreal*, [1906] A.C.

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100; *Plimmer v. Mayor, etc., of Wellington* (1884), 9 App. Cas. 699; *Port Arthur High School Board v. Town of Fort William* (1898), 25 A.R. 522; *Township of Pembroke v. Canada Central R.W. Co.* (1882), 3 O.R. 503; *City of Toronto v. Toronto R.W. Co.* (1906), 12 O.L.R. 534; *Wyandotte Electric Light Co. v. City of Wyandotte* (1900), 124 Mich. 43; *St. Louis Gaslight Co. v. City of St. Louis* (1870), 46 Mo. 121. Apart from the trial judgment, the respondent company has a legislative right, irrespective of the powers of the city corporation, to go on streets; the company's operations could be regulated but not prohibited by the city corporation: the Electric Light Companies Act, 45 Vict. ch. 19 (O.); *Township of Bucke v. New Liskeard Light Heat and Power Co.* (1909), 1 O.W.N. 123. [MEREDITH, C.J. O.:—The Gas and Water Companies Act, R.S.O. 1897, ch. 199, sec. 17, shews the policy of the Legislature for forty years.] As to the effect of the agreement in regard to underground wires, see *City of Montreal v. Standard Light and Power Co.*, [1897] A.C. 527. In regard to the right to buy out the company's undertaking, see *City of Toronto v. Toronto Electric Light Co.* (1905), 10 O.L.R. 621. *City of Toronto v. Toronto R.W. Co.*, 37 S.C.R. 430, must be distinguished, as in that case the reasoning of Idington, J., would apply to the limits of the city if extended. Reference was also made to the Ontario Joint Stock Companies Letters Patent Act, R.S.O. 1877, ch. 150, sec. 14.

A. W. Anglin, K.C., on the same side. On the question of notice as to putting up poles after 1889, see *City of Toronto v. Toronto Electric Light Co.*, 10 O.L.R. 621. In the same case facts may exist which will justify a case being put on estoppel and lost grant: *Goldsmid v. Great Eastern R.W. Co.* (1883), 25 Ch. D. 511. All we require is a consent to go on the streets. Estoppel involves the notion of representation, and must be distinguished from acquiescence or consent. [*Re Ontario Bank, Massey and Lee's Case* (1912), 27 O.L.R. 192, was referred to by GARROW, J.A.] Acquiescence binds a municipality: *Township of Pembroke v. Central Canada R.W. Co.*, 3 O.R. 503; *Port Arthur High School Board v. Town of Fort William* (1898), 25 A.R. 522; *Winnipeg Electric R.W. Co. v. City of Winnipeg*, [1912]

A.C. 355; *Regina v. Great Western R.W. Co.* (1862), 21 U.C.R. 555; *Plimmer v. Mayor, etc., of Wellington*, 9 App. Cas. 699.

Geary, in reply, referring to the argument that acquiescence binds a corporation, contended that there could be no acquiescence without notice, and no notice to officials would be sufficient; the notice must be to the corporation in a formal way. On the question of estoppel, he referred to *McGee v. Kane* (1887), 14 O.R. 226; *Croswell's Law relating to Electricity* (1895), pp. 124-126.

[The contentions of counsel with regard to the effect of the various agreements between the parties and of other documents and facts in evidence are referred to at length in the judgments.]

March 15, 1915. MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment dated the 14th May, 1914, which was directed to be entered by Middleton, J., after the trial of the action before him, sitting without a jury, on the 29th and 30th April and 1st May, 1914; and the reasons for judgment are reported in 31 O.L.R. 387.

The action involves a determination as to the rights of the respondent to use the streets, highways, and public places of the city of Toronto for conducting electricity for the purposes of light, heat, and power "by any means, through, under, and along the streets, highways, and public places" of the city.

The respondent was incorporated by letters patent dated the 20th September, 1883, "for the purposes and objects following, that is to say: to manufacture, produce, use, and sell electric light and power; to erect and construct plant, works, buildings, store-houses, and all other machinery for the production or manufacture of such electric light or power, and to lay down, set up, maintain, renew, and remove in and upon and under the streets, squares, and public places of the said city of Toronto, all wires, lines, tubes, pipes, poles, posts, and all other apparatus and appliances to enable said company to supply and distribute such electric light and power; to supply electric light or power to such persons, companies or corporations, as may require the same on such terms as may be agreed; to acquire such real estate by purchase or by lease as may be requisite for carrying on the business of

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the said company; to acquire by purchase, contract, agreement, or under license or otherwise, the right to hold, keep, maintain, use, and enjoy any patent, patent rights, or other rights for the manufacture, production, use, and sale of electric light or power, and to sell, lease, or otherwise dispose of said patent or other rights or any of them, and to manufacture or buy and also to sell or lease all fittings, machines, apparatus, or other things required for the use of the said company or its consumers;" and the letters patent were issued under the authority of the Ontario Joint Stock Companies Letters Patent Act (R.S.O. 1877, ch. 150), and of the Act passed in the 45th year of the reign of her late Majesty Queen Victoria, ch. 19, intituled "An Act respecting Companies for supplying Electricity for the purposes of Light, Heat, and Power."

By sec. 2 of this latter Act it is provided that "every company incorporated under this Act may construct, maintain, complete, and operate works for the production, sale and distribution of electricity, for purposes of light, heat, and power, and may conduct the same by any means through, under, and along the streets, highways, and public places of such cities, towns, and other municipalities" (i.e., cities, towns, and municipalities in which the company is authorised to carry on its operations); "but as to such streets, highways, and public places, only upon and subject to such agreement in respect thereof as shall be made between the company and the said municipalities respectively, and under and subject to any by-law or by-laws of the councils of the said municipalities, passed in pursuance thereof;" and by sec. 3 certain sections of the Act respecting Joint Stock Companies for supplying Cities, Towns and Villages with Gas and Water (R.S.O. 1877, ch. 157) are to be read *mutatis mutandis* as part of the Act. Among the sections thus incorporated is sec. 54, which authorises the breaking up, digging and trenching of so much and so many of the streets, squares, highways, lanes and public places of the municipality for supplying which with gas or water, or both, the company has been incorporated, as are necessary for laying the mains and pipes to conduct the gas or water, or both, from the works of the company to the consumers thereof, doing no unnecessary damage in the premises, and tak-

ing care as far as may be to preserve a free and uninterrupted passage through the said streets, squares, highways, lanes and public places, while the works are in progress.

No question has arisen as to the underground system and services of the respondent except as to the limits within which the rights conferred by the agreement of the 13th November, 1889, to which I shall afterwards refer, may be exercised; but it is contended by the appellant that the condition upon which alone the respondent is authorised to conduct electricity for the purposes of light, heat, and power through, under, and along the streets, highways, and public places in the city, except by means of underground conduits as provided by this agreement, has never been complied with, and also that any right which the respondent has to exercise any of these powers is confined to territory included within the limits of the city of Toronto as it existed when the letters patent were issued.

The first question to be considered is the effect of the qualifying words of sec. 2 as to the use of the "streets, highways, and public places." That the right to conduct electricity by any means through, under, and along the streets, highways, and public places, is not an absolute right, is clear, for it is to be exercised "only upon and subject to such agreement in respect thereof as shall be made between the company and the said municipalities respectively, and under and subject to any by-law or by-laws of the councils of the said municipalities, passed in pursuance thereof."

The word "upon" "may undoubtedly either mean *before* the act done to which it relates, or *simultaneously with* the act done, or *after* the act done, according as reason and good sense require the interpretation, with reference to the context and the subject-matter of the enactment:" *per* Bovill, C.J., in *Paynter v. James* (1867), L.R. 2 C.P. 348, 354; to the same effect, *per* Tindal, C.J., in *The Queen v. Humphery* (1839), 10 A. & E. 335, 370; and *per* Denman, C.J., in *The Queen v. Arkwright* (1848), 12 Q.B. 960, 970.

As used in sec. 2, the word "upon," in my opinion, plainly means that what the section prescribes is a condition precedent to the exercise by the company of the right to conduct electricity

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through, under, and along the streets, highways, and public places of the municipality.

The reasoning of the Judges in stating their opinions in *The Queen v. Justices of Lancashire* (1857), 8 E. & B. 563, is applicable to the use of the word "upon" in sec. 2. In that case the question arose upon sec. 88 of 5 & 6 Wm. IV. ch. 50, which allows a party to make his appeal "upon giving ten days' notice," and Coleridge, J., said of that provision: "It would be frittering away the words if we were to hold that the appeal could be made without such notice being given; they are equivalent to the words 'if he shall give' such notice: if he has not given such notice, the appeal falls to the ground" (p. 571).

The opinion of Lord Campbell is still more emphatic. "That section," he said, "allows an appeal 'upon giving' ten days' notice, together with the statement of grounds of appeal. The English language has not terms which could more pointedly express that the giving the notice is a condition precedent to the appeal" (p. 569).

The opinion of Wightman, J., was that "the word 'upon' clearly imposes a condition" (p. 571); and Erle, J., treated it as meaning "not unless."

That the intention of the Legislature was to use the word "upon" in the sense in which it was held, in the case to which I have just referred, to have been used, is emphasised by the addition of the word "only." It indicates in the clearest manner, I think, that the Legislature intended that there should be no interference with the control by the municipal authorities of their streets, highways, and public places, unless the condition which the section provides for had been complied with.

What then is the condition which is to be complied with? It is not, in terms at all events, that the consent of the municipal authorities shall be obtained, but it is that the company's power to use the streets, highways, and public places of the municipalities shall be exercised "only upon and subject to such agreement . . . as shall be made between the company and the said municipalities respectively, and under and subject. . . ."

What the section means and its language expresses is, I think, that a company shall not have the right to conduct electricity

through, under, and along the streets, highways, and public places of the municipality until it shall have entered into an agreement with the corporation of the municipality by which it shall be authorised to do so upon such terms and conditions as the corporation may impose; and it cannot have been contemplated that a company should be at liberty to make use of the streets, highways, and public places at its mere will and pleasure unless the municipal authorities should intervene and forbid altogether the use of them, or the use of them unless the company should be willing to agree to terms and conditions governing their use, if, in the opinion of the municipal authorities, it should be deemed necessary or advisable in the public interest to impose any such terms and conditions.

It is not to be forgotten that municipal councils are a part of the machinery for the civil government of the Province, and that to them have been delegated many of the powers both of legislation and of administration which by the British North America Act are vested in the Provincial Legislatures.

In the municipal councils is vested the control of the streets and highways within the limits of their municipalities, with certain exceptions to which it is unnecessary to refer; and upon the corporations of these municipalities is imposed the duty of keeping them in repair, which involves, according to the decided cases, keeping them free from obstructions which expose to danger travellers upon them; and, in case of failure to perform that duty, the corporation in default is liable criminally and is also liable in damages to any person who has sustained injury to his person or property by reason of that failure.

It is manifest that, in view of this, it is altogether unlikely that the Legislature would confer upon electric light companies the right in perpetuity to make use at their own will and pleasure of all or any of the streets, highways, and public places of the municipality; to use at their option an overhead or underground system of conducting electricity; to use for an overhead system poles of any description they might find it convenient to use, and to string on these poles as many wires as they might see fit, regardless of the convenience of the travelling public, the mar-
ring of the beauty of the streets, highways, and public places, or

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the danger in case of fire of a network of wires interfering with the work of the firemen.

When the Electric Light Companies Act was passed in 1882 (45 Vict. ch. 19), it was the settled policy of the Legislature, in the case of public utilities, not to confer unrestricted powers, but, either by enactment of the Legislature itself to restrict the powers of companies incorporated for establishing and carrying them on, or by delegation to confer upon the municipal councils of the localities authority to impose restrictions upon the powers of the companies, and in some cases to prevent altogether the powers from being exercised.

In dealing with gas and water companies it is made a condition precedent to the incorporation of a company that a by-law shall have been passed by the council of the municipality in which the operations of the company are to be carried on, granting authority to the persons seeking incorporation to lay down pipes for the conveyance of gas or water under the streets, squares, and other public places of the municipality: R.S.O. 1877, ch. 157, sec. 4.

In like manner, in incorporating street railway companies, the exercise of a company's right to construct its tracks along the public streets and highways is confined to such of them as the company shall be authorised to pass along, under and subject to any agreement thereafter made between the council of the municipality and the company, and under and subject to any by-law of the corporation, and provision is made as to the tracks being laid so as to offer the least possible impediment to the ordinary traffic of the streets and highways, and limiting the amount of the fares to be charged; and wide powers are conferred on the council of the municipality of entering into agreements with the company as to various matters relating to the construction and operation of the railway. An instance of this kind of legislation is found in the Act incorporating the London Street Railway Company (36 Vict. ch. 99); and, without any exception, Acts incorporating street railway companies passed in 1873 and subsequently contain similar provisions.

So, too, with regard to toll roads, the General Road Companies Act, R.S.O. 1877, ch. 152, sec. 8, provides that "no such

road shall be constructed or pass within the limits of any city, or of any incorporated town or village, except by permission, under a by-law of the city, town or village, passed for that purpose."

So also as to companies for the construction of piers, wharves, drydocks and harbours, R.S.O, 1877, ch. 154, sec. 4, provides that "before any such company proceeds with its work, it shall obtain the consent of the municipality within which the work is proposed to be made, and the municipality may fix the limit and boundary of a proposed harbour."

It is obvious that in a general Act providing for the incorporation of electric light companies it was, if not impracticable, at all events inconvenient, to prescribe the conditions under which the right to use the streets, highways, and public places of the municipality should be exercised. These conditions would necessarily vary. It might be proper in some municipalities to confer wide powers on the company, and in others it might be desirable, if not necessary, to confer limited powers and to impose conditions; and what the Legislature did was to leave it to the judgment of the municipal authorities of the locality to determine whether there should be any right conferred to use the streets; highways, and public places of the municipality; and, if they decided to confer the right, to determine the conditions upon which it should be granted; in other words, it delegated to the municipal authorities the powers which itself possessed of granting or withholding the right to use the streets, highways, and public places of the municipality, and of determining the terms and conditions upon and subject to which the right should be exercised, if it were determined to grant it.

This involved legislative action by the municipal authorities; and nothing could, I think, have been further from the intention of the Legislature than that a company should acquire, by mere active or passive acquiescence on the part of the officials or servants of the corporation of the municipality, the right to use the streets, highways, and public places without the consent or permission of the corporation or the agreement having been entered into for which sec. 2 provides. If it were otherwise, the company might deliberately abstain from asking for the pre-

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scribed consent or permission, or from seeking to enter into an agreement, because it knew that the consent or permission could not be obtained, or an agreement be come to without the imposition of terms and conditions the imposition of which the company desired to avoid, and take the chance of going on with its operations, trusting that if it were not interfered with it might be able to obtain, by an application of the doctrine of estoppel, or on the ground of acquiescence or the fiction of a lost grant, a perpetual franchise untrammelled by conditions safeguarding the public interests, which the company knew or had reason to believe would have been imposed if the direct course had been taken of applying formally for the prescribed prerequisite, when its application would have come before the public body entrusted with the government of the municipality, and what was done would have been done under the public eye.

Dealing with a somewhat similar question in *Ghee v. North-ern Union Gas Co.* (1899), 158 N.Y. 510, 513, Chief Justice Parker, delivering the judgment of the Court of Appeals, and speaking of a section of the Transportation Corporations Act, which provided in substance that if a corporation were incorporated for the purpose of supplying gas for light in the city, town or village where it is located, it must first obtain the consent of the municipal authorities thereof, said: "At the threshold of the consideration of these questions, it will be well to have in mind the legal effect of the consent which the municipal authorities are authorised to give by the Transportation Corporations Act. It operates to create a franchise by which is vested in the corporation receiving it a perpetual and indefeasible interest in the land constituting the streets of a municipality. It is true that the franchise comes from the state, but the act of the local authorities, who represent the state by its permission and for that purpose, constitutes the act upon which the law operates to create the franchise. The state might grant the franchise directly to the corporation without the consent of the local authorities, and has done so in many instances; but the tendency of later years, which is well grounded in reason, is for the state to confer upon the local municipal authorities the right to represent it in the matter of granting franchises to the extent that the final

act necessary to the creation of franchises must be exercised by such authorities. The legal effect of the consent, therefore, is the same as if the local authorities in form granted the franchise and the interest in the land."

Dealing with the argument that the authority to give the consent which theretofore had been vested in the legislative branch of the city government of New York had been transferred by the charter of the city, of 1897, to two subordinate administrative officers, the learned Chief Justice said (p. 514): "The use of the space in the streets of New York, whether on the surface or beneath it, has been steadily growing in importance and value, and will probably so continue for many years to come. The accumulation underground, during the past few years, of sewers, electrical subways, cable and electrical railway conduits, pneumatic tubes, steam-heating, water and gas pipes, seems to indicate that the day may come when there will be no more unoccupied space beneath the surface of the streets, and of this situation the Legislature and the learned commissioners who drafted the charter undoubtedly had full knowledge. It is difficult to believe that, with such knowledge, they would attempt to take away from general and responsible representatives of the people the power to grant such important and valuable rights and vest them in subordinate administrative officers. . . ."

With these observations of the learned Chief Justice I respectfully and entirely agree; and his reasoning, though applied to different facts and circumstances, is in principle applicable to the contention of the respondent that the rights which it claims could be conferred by the acts of officers and servants of the appellant.

Some of the views expressed by Lord Atkinson in stating the opinion of the Judicial Committee of the Privy Council in the recent case of *British Columbia Electric R.W. Co. Limited v. Stewart*, [1913] A.C. 816, 14 D.L.R. 8, seem at first sight to be opposed to the views of Chief Justice Parker; but they are not so, I think, as will appear when the case is more closely examined. In that case the powers of the railway company were somewhat similar to those conferred upon the respondent by the Electric Light Companies Act, and all that was decided was that

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an agreement and by-law of a municipal corporation, by which its consent to the use on certain conditions of streets in the municipality was given, did not operate to confer upon the railway company a "right, franchise, or privilege," within the meaning of sec. 64 of the Municipal Clauses Act, 1896, which provided that a charter bestowing a right, franchise, or privilege should not be valid unless the by-law by which it was bestowed had been submitted to the electors of the municipality and had received the assent of not less than two-fifths in number of the electors who voted upon it. In stating the opinion of the Board, Lord Atkinson said (p. 824) that the powers of a municipal corporation were of a restrictive, not of a donative, character; that they did not enable the corporation to give, grant, or confer any right, power, or privilege upon the company; and that their only function was to circumscribe, or impose conditions upon, the exercise by the company of the rights, powers, and privileges already conferred upon it by the Legislature.

It is unnecessary to consider whether the same conclusion would have been reached if the powers conferred upon the company had been conferred in the terms in which the powers of the respondent are conferred by the Act under which it was incorporated.

I do not understand that the view expressed by Chief Justice Parker differs from that of Lord Atkinson. What the Judicial Committee had to decide was, whether, in the circumstances of the British Columbia case, what the municipal authorities had done was "to grant a charter bestowing a right, franchise, or privilege," within the meaning of sec. 64 of the Municipal Clauses Act, 1896. What the Chief Justice was dealing with was a very different question, viz., what body was to exercise the power, whether donative or restrictive in its character, which was to be exercised by the municipal authorities, and the Chief Justice's statement was that, though the franchise came from the state, the act of the local authorities constituted the act upon which the law operated to create the franchise, and that the legal effect of the consent was the same as if the local authorities in form granted the franchise and the interest in the land.

It appears from the report of the British Columbia case that

the respondents were not represented by counsel, and the Judicial Committee was not therefore informed of what I judge was the fact, as it is in the case of this Province, that it is not within the powers of municipal corporations to grant "charters bestowing rights, franchises, or privileges," if to those words is attributed their technical meaning, and that where a company exercises its statutory rights under such legislation as that by which the respondent's powers are declared, the giving of the consent of the municipal authorities to the exercise of them, wholly or in part, or unconditionally or conditionally, is usually spoken of and treated on this side of the Atlantic as the conferring of a franchise or the granting of a right or privilege; and it is in that sense, and not according to their technical meaning, that the words are used by Legislatures.

By the Electric Railway Act, R.S.O. 1897, ch. 209, sec. 9, subsec. 1 (c), the railway may be carried "along and upon such public highways as may be authorised by the by-laws of the respective corporations having jurisdiction over the same, and subject . . . ;" and in an Act passed in 1902, intituled an Act respecting Electric Railways, 2 Edw. VII. ch. 27, this is spoken of as the passing of a by-law authorising the railway company to lay out and construct its railway on the streets of the municipality.

The use of the word "franchise" in the sense I have mentioned is shewn by the Municipal Franchises Act (R.S.O. 1914, ch. 197), which deals with the passing of such by-laws as those I have mentioned, and throughout the Act the effect of such a by-law is treated as the granting of a right, and the right granted as a franchise.

A British Court is necessarily placed at a disadvantage in construing an enactment of a Provincial Legislature conferring powers on an electric railway company or a public utility company, if its attention is not called to the difference between the conditions which obtain in the Province and those which obtain in England and to the meaning which is given in the Province to terms which are differently understood in England. The meaning of the words "bestowing a right, franchise, or privilege," is an instance of the latter kind, and the use of the word "tracks"

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as applied to a railway is another. I do not doubt that the decisions of the Judicial Committee in cases affecting the rights of street railway companies, which have occasioned dissatisfaction in some quarters, might have been different if the considerations I have mentioned had been brought to the attention of and had been fully appreciated by the Committee.

There is no case that makes it necessary for us to hold that the power which sec. 2 vested in the appellant could be exercised otherwise than by a corporate act—by which I mean an act done by the corporation itself under the authority of its municipal council.

It has been held, no doubt, that where the act to be done is not one provided for by the Municipal Act the will of the corporation may be expressed by resolution, and that a by-law is not necessary. It was so held by Osler, J.A., in *Township of Pembroke v. Canada Central R.W. Co.*, 3 O.R. 503, and his decision was approved by the Court of Appeal in *Port Arthur High School Board v. Town of Fort William*, 25 A.R. 522; and in *In re Township of Nottawasaga and County of Simcoe* (1901), 3 O.L.R. 169, in *Regina v. Great Western R.W. Co.*, 21 U.C.R. 555, and in *City of Toronto v. Toronto R.W. Co.* (1905-6), 11 O.L.R. 103, 12 O.L.R. 534, the same conclusion was reached.

In all these cases the municipal council had acted, and the only question was whether, having acted by resolution and not by by-law, its action was effective, and none of them lends colour to the view that the power conferred upon the municipal authorities by sec. 2 could be effectively exercised otherwise than by some corporate act.

It is open, I think, to grave question whether the doctrine of estoppel or the barring of rights by acquiescence or laches has any application to the creation of such rights as by sec. 2 the appellant was empowered to confer upon the respondent. The right which the respondent would acquire, on obtaining an agreement from the appellant authorising the respondent to use the streets, highways, and public places of the city of Toronto, was not a right in or to property which belonged to the appellant or something which pertained to or affected what I may term its private rights or interests.

The effect of sec. 2, as far as it relates to the restrictions upon the right to use the streets, highways, and public places for the purpose of conducting electricity through, under, or along them, which it imposes, was, in my opinion, to confer upon the municipal authorities, as Chief Justice Parker puts it, the right to represent the Legislature in the matter of granting that franchise "to the extent that the final act necessary to the creation of" it "must be exercised by such authorities," and to confer upon them the right to do what in its legal effect was the granting of the franchise, and therefore to give or to withhold the franchise as they might deem proper in the public interests, and also to delegate to the municipal authorities the power and to cast upon them the duty, if they determined to grant it, of imposing such terms and conditions as, in their judgment, a due regard to those interests required them to impose.

What the Legislature did was in truth to repose in the municipal authorities a trust and to impose upon them a duty to safeguard the public interests of the locality over which they had jurisdiction; and I cannot understand how, by the application of the doctrine of estoppel or by laches or acquiescence, the public can be deprived of the protection which the Legislature provided for them by sec. 2, merely because the municipal authorities, through carelessness or otherwise, have failed in the performance of their duty.

I do not mean to be understood to entertain the opinion that whether or not the right should be granted, or, if granted, upon what terms and conditions it should be granted, were not matters left entirely to the discretion of the municipal authorities; but what I do think is, that the right could not be effectively granted unless or until they had exercised that discretion by some corporate or legislative act.

The respondent's authority to use the streets, highways, and public places of the city, on the conditions prescribed by sec. 2, is not unlike the right to construct a bridge which interferes with navigation, and that is prohibited unless the site of the bridge has been approved and it is built and maintained in accordance with plans approved by the Governor in Council (Navigable Waters' Protection Act, R.S.C. 1906, ch. 115, sec.

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4); and I venture to think that a person who had built and was maintaining a bridge, without having complied with the provisions of the section, would have a difficult task in endeavouring to maintain that the bridge was not an unlawful structure because it has been in use by the public for years, and that to the knowledge and with the acquiescence of officers of the Department of Public Works, and I have no doubt that he would have no answer to an action for interfering with navigation unless he were able to shew that the conditions prescribed by the statute were complied with and to produce the only document which would prove it—an order in council.

I am of opinion, however, that, even if the views I have expressed are unsound, the respondent's case, except as to the matters to which I shall afterwards refer, fails, and that neither on the ground of laches or acquiescence on the part of the appellant nor of estoppel nor on the fiction of lost grant was the respondent entitled to succeed.

That there never was any express consent by the appellant to the exercise by the respondent of its statutory powers to make use of the streets, highways, and public places of the city, is, I think, abundantly clear; and, as I understand his reasons for judgment, that was the view of my brother Middleton; but he was of opinion (31 O.L.R. at p. 403) that "on the plainest principles of the law of estoppel, the city cannot now allege that the consent necessary to be given was not given in 1883."

It is difficult to understand from the pleadings the exact ground upon which the respondent bases its claim to have had the right to erect the poles for the cutting down of which the action is brought. As I understand the statement of claim, the right is claimed to be derived from the Electric Light Companies Act and the respondent's charter, or from the agreement of the 13th November, 1889, or from both, and there is no allegation or even suggestion of any other source from which it was derived or any claim to support it upon the grounds upon which it is supported by my brother Middleton; though that was no doubt one of the grounds urged by the respondent at the trial, as it was upon the argument of the appeal.

Now, in order to raise an estoppel the person who sets it up

must have been mistaken as to his own legal rights and must have expended money or done some act on the faith of his mistaken belief; and the person against whom the estoppel is set up must have known of his own rights and of the other person's mistaken belief, and must have encouraged him in his expenditure of money or other act, either directly or by abstaining from asserting his legal right: Halsbury's Laws of England, vol. 13, p. 167, para. 201.

Why counsel for the appellant was not permitted to ask the witness Wright, who had been the respondent's general manager for twenty-six years, the question, "Did you know when you entered into that first Chicora avenue agreement that you were not to put up poles excepting for street lighting, except they were covered by special agreement?" I do not understand. It was, in my opinion, a proper question, designed to elicit from the witness something most material on the issue of estoppel, viz., the view which the respondent, when it was erecting poles, entertained as to what its legal rights were with regard to the erection of them without a special agreement with the appellant; and, if the answer had been in the affirmative, it would have gone a long way towards putting an end to the respondent's case as far as it is rested on estoppel, because it would have shewn that the respondent did not expend its money under a mistaken belief as to its legal rights.

Subject to what I shall say as to the agreement of the 13th November, 1889, with which I shall deal later on, all the documentary evidence is inconsistent with the view that any general assent to the use of the streets, highways, and public places was ever given, and leads irresistibly, I think, to the conclusion that the respondent was never under any mistake or misapprehension as to its legal rights, and did not extend its operations or expend its money under the mistaken view that it had obtained the consent of the appellant to the exercise by it of the powers and rights to use the streets, highways, and public places, which the statute conditionally confers; but, on the contrary, throughout its dealings with the appellant until the year 1904, recognised that it had no right to erect any pole or string any wires there without getting express authority from the appellant to do so.

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The first step taken to obtain the permission of the appellant to the use of the streets, highways, and public places of the city, for the purpose mentioned in sec. 2, was an application made before the issue of the letters patent, on behalf of the proposed company by the applicants for them, which resulted in an agreement being entered into between the applicants and the appellant on the 30th August, 1883, by which the appellant consented and agreed "to permit and allow" the applicants and the respondent when incorporated to erect, subject to the conditions and provisions of the agreement, upon and in the public streets, squares, and other public places, within the area mentioned in the agreement, "all such poles, wires, and other apparatus as they" might "require for the purpose of lighting such streets, squares, public places, and public or other buildings," within that area.

One of the terms and conditions of the agreement was, that "all poles, wires, and other apparatus to be erected by" the applicants or by the respondent, under the agreement, "on or in any street, square, or public place," within the area mentioned in the agreement, should "be removed, and the surface of all of the said streets, squares, and public places" should "be restored to as good a state and condition as the same" were "in at the time of the erection of any such poles, within three months after" the receipt of notice to the applicants or to the respondent from the appellant requiring them to be removed.

The agreement contains this further provision: "It is distinctly understood and agreed by and between the parties hereto that this agreement is an interim agreement until the Toronto Electric Light Company shall receive its charter of incorporation and become duly organised, and shall have duly executed an agreement similar to these presents in all its terms and conditions, which said last mentioned agreement, when duly executed as aforesaid and tendered to the parties of the second part, shall be accepted by them in lieu of and in substitution for these presents, which shall thereupon be delivered up to be cancelled, and shall thereafter cease to be binding on the parties of the first part."

It does not appear whether or not the substituted agreement

provided for was executed by the respondent, but it does appear that the applicants for the charter and the respondent acted upon the agreement, and that the respondent treated it as an agreement with it, for on the 12th November, 1883, a petition was presented by the respondent to the mayor and council, praying that the agreement should be amended in certain particulars.

The petition refers to the agreement of the 30th August, 1883, as being an agreement by which the respondent was allowed to erect poles and wires temporarily for the purpose of affording an opportunity of testing the electric light within the area mentioned in the agreement, "upon the condition that the poles should be erected under the supervision of the city engineer, and be not less than 150 feet apart and 30 feet in height;" the petition then states that, since the agreement was made, the respondent had been duly incorporated by charter from the Government, and had entered into operations, and had then upwards of fifty lamps in regular operation within that area; that the respondent was "desirous that the restrictions as to the limits within the bounds of the city in said contract be removed;" and that the respondent should be authorised to erect poles and wires for lighting purposes and carrying electric power throughout the whole area of the city, and was desirous also of having the restriction as to the height of the poles removed; and the prayer of the petition was, that the agreement should be amended and enlarged in these two particulars, and that a new agreement embodying these amendments should be entered into.

The action taken by the council with regard to this petition was, that on the 10th December, 1883, a resolution was passed that the respondent should "be permitted to place poles on Front street only, as far west as Bathurst street . . . on the same terms and conditions as the privileges already accorded to the said company;" and a copy of the report of the Committee on fire and gas, embodying their recommendation that this permission should be granted, as amended by the council, was transmitted to the respondent on the 13th of the same month.

The respondent appears to have gone on with its operations within the area within which it was given permission to erect

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poles, for, according to the statement put in at the trial, exhibit 28, its receipts from commercial lighting for 1884, beginning with February, were considerable.

On the 6th September, 1884, an agreement was entered into by the respondent with the appellant for lighting the public streets and public parks, squares, and other public places of the city, for the term of five years, commencing from the 15th May, 1884, by which the respondent agreed to furnish and supply all the electric lights required by the appellant for those purposes.

One of the terms of this agreement was, that the appellant might discontinue any number of the lights from time to time until the number was reduced to fifty, upon giving six months' notice to the respondent, and might, on the like notice, cancel the agreement; and that, in the event of that being done, the respondent should, at its own cost and expense, take down and remove all its wires, cables, poles, and other appliances from off the streets and other public places, and restore them to the same or as good condition as they were in when the poles and other appliances were erected.

This agreement was put an end to as from the 30th June, 1886, by a new agreement entered into on the 14th January, 1886, for lighting the streets, public parks, buildings, and other places of the city for the term of four years and six months from the 1st July, 1886.

After the expiration of the street lighting contract of the 14th January, 1886, street lighting contracts were entered into on the 20th October, 1890, the 31st July, 1895, the 10th December, 1900, and the 29th December, 1905, each of them being for a term of five years, to be reckoned in the case of the last contract from the 1st January, 1906; and, after the expiration of the term of the last contract, temporary agreements for the continuance of it were made, and the street lighting finally ceased in December, 1911.

All of these contracts, except the one of 14th January, 1886, provided that all unused poles—which I take to mean all poles not required for the purpose of supplying electric light under the contract—are to be removed by the respondent at its own expense; and in the specifications for the last contract, which

are made part of it, the following provision is contained: "At the expiration of this contract all poles and other appliances used by the said contractor upon the city streets shall, at the option of the said corporation, be removed by the said contractor, and the roadbed or sidewalk restored as though said poles had not been therein, at his own expense, or be purchased by the corporation at a price to be agreed upon or to be determined by arbitration. In the event of the corporation deciding not to purchase the said poles or other appliances, and if the contractor shall neglect or refuse to remove said poles and other appliances off the city streets within three months after the expiration of the contract, the corporation shall be at liberty to remove the same at the expense of the contractor, and either deduct the cost thereof from any money due the said contractor or may recover the same by action in any Court of competent jurisdiction as a debt due to the said corporation" (para. 30).

Notice was given to the respondent, in accordance with this provision, on the 9th December, 1911, by a letter written by the appellant's solicitor, in which he says: "Acting under instructions from the Corporation of the City of Toronto, I hereby notify you, according to the terms and conditions of your contract with the city for street lighting, which contract was dated 29th December, 1905, and now that the said contract and renewals thereof have expired, to remove at your own expense all poles and other appliances used by you upon the city streets, and to restore the roadbed or sidewalk as though said poles had not been therein." And in his reply the respondent's general manager said: "I beg to acknowledge the receipt of your letter of the 9th instant, notifying us that in accordance with the terms of the contract for street lighting dated the 29th December, 1905, you have decided to forgo your right to purchase the street lighting equipment and have requested us to remove the same. We will at once dismantle and remove the street lighting equipment used for the purpose of carrying out said contract."

It appears from the evidence that the respondent had made some arrangement with other companies for the right to use their street poles for stringing the respondent's wires upon them, and was transmitting electricity to some of its customers

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under this arrangement. During what period the arrangement was in force, or whether it has always existed, does not appear, but it would appear that the appellant was not notified of the existence of the arrangement or of the fact that the respondent was using the poles of these companies for the purpose of its business, excepting so far as information that there was an arrangement as to the use of three of the Bell Telephone Company's poles between York and Lorne streets, and as to the use of that company's poles on Front street between York and Simcoe streets, was conveyed to the department of the city engineer by the respondent's letter of the 4th July, 1893, to Mr. Keating, the city engineer, and by its letter of the 18th May, 1894, to Mr. Rust, the assistant engineer, in which they were asked to consent to the arrangement.

These applications related to poles within the area mentioned in the agreement of the 30th August, 1883; and it is significant that, at so late a date as the years 1893 and 1894, in so small a matter as this, it was thought by the respondent that what was proposed to be done could not be done without the permission of the appellant. So also in the matter of replacing poles, of the reconstruction of a line of them, and the removing of poles from one side of a street to another, permission was sought and obtained from the city engineer, as appears from the correspondence which is marked exhibit 43.

On the 16th October, 1901, a formal application by letter was made by the respondent for permission to put up four poles on the north side of Chicora avenue, west of Avenue road, and three poles on the north side of Winchester street east of Rose avenue. To this letter there was a postscript as follows: "I may say that the locations are outside the limit that was set for underground wires, viz., south of Bloor street between Jarvis street and Spadina avenue"—which seems to indicate that there was an arrangement between the parties as to the section of the city within which the wires of the respondent were to be put underground.

In answer to this letter, Mr. Rust wrote on the 21st October, 1901, that he had no power to give the permission asked for; and an application for the permission was then made by letter

of the 24th October, 1901, to Mr. McGowan, the secretary of the fire department; and the result was, that the permission was granted, on the terms of a formal agreement (exhibit 23) between the respondent and the appellant, by which the respondent covenanted and agreed with the appellant that the respondent would immediately remove these poles from the streets at any time, upon receiving two weeks' notice from the secretary of the fire department so to do, and would restore the streets to their former condition, without any compensation for so doing.

How it is possible, in view of this letter and agreement, to conclude that the consent of the appellant to the exercise of the rights mentioned in sec. 2 had already been given, I cannot conceive. The application and the agreement are entirely inconsistent with that view.

A long list of similar applications made by the respondent was put in at the trial (exhibit 24). It covers applications made in the years 1901 to 1910, both inclusive, and in all these cases down to December, 1904, similar agreements were entered into.

In December, 1904, and thereafter, a change was made in the agreements by adding at the end of them the following: "Provided, however, that this agreement is without prejudice to any rights which the company may have for the erection and maintenance of poles and wires in the streets or public places in said city for transmission of electrical energy for the use of the citizens thereof."

These numerous applications for permission to erect poles in the streets, and the terms upon which permission was in each case granted, are entirely inconsistent with the view that the consent of the appellant to the use by the respondent of the streets, highways, and public places of the city for the purposes mentioned in sec. 2 had been given, and they cannot be explained away by saying that the applications were made because the consent that had been given was conditional on the location of the poles being satisfactory to the appellant. The applications were not applications for the approval of the proposed location of the poles, but for permission to erect them, and the obligation which the respondent undertook of removing them on notice indicates in the clearest manner, I think, that what was asked for

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was a permission which was deemed necessary to entitle the respondent to exercise its statutory right to erect poles and string wires in a city street.

I come now to the agreement of the 13th November, 1889, which was relied upon not only as a recognition by the appellant of the right of the respondent to use the streets, highways, and public places of the city for the purposes of its overhead system, but also as containing an express grant of that right, and I shall at this stage deal only with the first of these contentions.

The agreement was the result of an application made by the respondent on the 25th February, 1889, for "permission to construct underground conduits for the purpose of running electric wires under the streets of the city, subject to the approval of the board of works or any officer thereof appointed for the purpose." It contains a recital that the respondent had been and was engaged in the business of producing and supplying electric light in the city of Toronto on the overhead system, and had plant, poles, and materials in use therefor, under which light was then being supplied to the city and individual citizens; that the respondent proposed to extend its works in Toronto for the further production, manufacture, and supply of electricity for the purpose of light, heat, and power, and other purposes, and had applied to the appellant for the right to lay down underground wires, conduits, and appliances for the further distribution and supply of electricity throughout the city, and that the appellant had agreed to grant that right upon the terms and conditions "thereinafter set forth," and by the agreement the appellant gave and granted to the respondent "the right (in addition to their works and plant in operation for the use of the city and individuals as aforesaid) to construct, lay down, and operate underground wires, conduits, and appliances for the distribution and supply of electricity as aforesaid, and to take up, renew, alter and repair the same," upon certain terms and subject to certain conditions, one of which is that "the company shall not, without the consent of the corporation, lease to, amalgamate with, or sell out to any other corporation, firm, or individual, and in case the company shall lease to, amalgamate with, or sell out to any other company, corporation, firm, or individual, all rights

granted without such consent by this agreement shall cease and be forfeited."

The agreement also gives to the appellant, subject to certain conditions, "the right to purchase all the interest and assets of the company, comprising plant, buildings, and material used or necessary for the carrying on of its business."

This agreement, no doubt, recognises the fact that the respondent had been and was doing that which is mentioned in the recital, and that it was done by means of an overhead system; but, in considering what effect should be given to this recognition, regard must be had to the fact that the appellant, by the agreement of the 30th August, 1883, had given to the respondent the right to use the streets in a large section of the city for the purposes of its business, and to carry it on there on the overhead system, and that it had an overhead system for street lighting.

These rights, as has been seen, were not absolute, but conditional, and the respondent was under obligation to the appellant to remove its poles, wires, and other appliances whenever required by the appellant to do so by the notice which it was required to give.

There is nothing to indicate that the rights conferred by the agreement of the 30th August, 1883, had been put an end to; and it is clear from the evidence that the respondent had, in pursuance of the permission granted to it under that agreement, extended its operations within the section of the city mentioned in the agreement, and was distributing and supplying electricity to the citizens of Toronto there. It is also shewn that the respondent was utilising, for distributing and supplying electricity to citizens, the poles it had erected for the purpose of the street lighting contract.

In view of this, it seems to me that the recitals may well be treated as having reference to the overhead system which had been established and was being used within the section of the city mentioned in the agreement of the 30th August, 1883, and to the overhead system in use for the other purposes I have just mentioned; and the recitals cannot fairly or properly be treated as a recognition of an existing right in the respondent to exercise

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its statutory powers to use all or any of the streets, highways, and public places of the city, at all events for the purpose of an overhead system.

Apart from the question as to the effect of the agreement as an express grant of the right to use the streets, highways, and public places of the city for the purposes of the respondent's overhead system, the agreement and the circumstances under which it was entered into shew clearly that, at all events in the view of the respondent, it had not then obtained the consent of the appellant to its exercising its statutory powers in respect of the streets, highways, and public places of the city, and that it was necessary, to enable it to inaugurate and carry on an underground system, to get from the appellant the right which it had applied for and obtained by the agreement. If such a consent had been given, the respondent needed no permission or grant from the appellant to entitle it to put its conduits and wires underground, for its statutory authority, when the consent has been given, extends to conducting electricity by any means, not only along, but through and under the streets, highways, and public places of the municipality (sec. 2), and express power to do the very thing which it sought and obtained from the appellant permission to do. (Section 54 of the Gas and Water Companies Act, which is incorporated in the Electric Companies Act, as I have already mentioned.)

It is inconceivable to me that the respondent, if it entertained the view that it already had, as my brother Middleton has found, the right to do what by the agreement it was empowered to do, would have sought to obtain the right from the appellant, and would have submitted to the terms and conditions which the agreement contains, especially that term which enables the appellant to convert a perpetual franchise, which on that hypothesis the respondent already possessed, into a franchise determinable at the will of the appellant at the periods stated in the agreement, and on the terms as to purchase which the agreement contains.

That the respondent well knew that it had no right to use the streets, highways, and public places of the city, without at all events the consent of the appellant, and that that consent must

be evidenced by a formal document, is, I think, the only conclusion that properly can be drawn from the facts and circumstances I have mentioned. It is clear, I think, that early in the respondent's history it became aware that the policy of the municipal authorities of the city was not to give any right to use the streets, highways, and public places except under terms and conditions evidenced by a formal instrument, and not to confer the right to make use of them except subject to the right of the appellant to require all poles, wires, and apparatus, that should be placed or erected in them, to be removed on notice to the respondent.

It may be said that the agreement of the 30th August, 1883, was a temporary one for the purpose of enabling a test to be made of electrical street lighting, in order to demonstrate that it was superior to gas lighting, and that is true; but the petition of the respondent for the variation of the agreement shews that the respondent's operations had at that time passed beyond that stage, and that it had "entered into operations" within the area mentioned in the agreement and had fifty lamps in regular operation there, and the respondent recognised by the petition that it was carrying on its business under the authority of the agreement, and desired to have the limitation of its powers of carrying it on, which the agreement contains, removed.

My strong impression is, that the respondent, finding that it could not get the permission which it sought by its petition of the 12th November, 1883, to obtain, or that if permission were granted to erect poles on any street it would be granted only on its undertaking to remove them on notice from the appellant, concluded to go on with the extension of its operations, taking the chance of having to remove from the streets the poles and appliances that it should erect in them, believing that it was improbable that it would ever be called upon to do so, at any rate so long as the service which it provided was satisfactory to the public. There is, to my mind, no other explanation of the respondent's conduct in not seeking to obtain from the appellant a permission which it recognised was necessary to entitle it to erect them, unless the respondent foresaw that, if it should continue long enough to erect its poles in the streets without being in-

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terfered with, it would ultimately be held to have acquired an absolute right to maintain them there, and indeed to erect and maintain there as many more of them as it might see fit in the future to erect, on the theory of acquiescence by the appellant, or by the application of the fiction of a lost grant, or of the doctrine of estoppel; and such foresight it is difficult to attribute to the respondent.

It was argued on behalf of the respondent that there are many facts and circumstances in evidence to warrant the conclusion to which my brother Middleton came. It is said that a number of poles vastly in excess of the number required for street lighting are shewn to have been erected in the streets, and to have been used for supplying electricity, not only to the citizens generally, but to the appellant itself; that this was known to the appellant's engineer and other officials; and that knowledge of it must be imputed to the municipal authorities and to the corporation itself.

There is, in my opinion, no satisfactory evidence of the number of poles of the respondent that are now in the streets. Evidence as to the number that have been erected since the respondent began business affords no means for determining it, for very many of these must have been renewals; and, even if the number had been ascertained, there is nothing to shew how many poles were erected under the agreement of the 30th August, 1883, or how many under the street lighting contracts. The section of the city to which, by that agreement, the right to erect poles was limited, is the commercial and business section, and very many of the poles must have been erected in it.

It is, no doubt, the fact that, although no permission had been given to erect poles and string wires for other than street lighting and lighting the public parks, squares, and buildings, except in the section mentioned in the agreement of the 30th August, 1883, as extended by the resolution of the council of the 10th December, 1883, as to which there was no such limitation, and except in the cases in which permission was given between 1900 and 1911, as I have already mentioned, the respondent made use of its street lighting poles for distributing and supplying electricity to private consumers, and that there was no interference

with and no objection by the appellant to that being done. It is also, doubtless, true that in some instances, and perhaps in many, electricity was supplied to private consumers by means of poles which were not used for street lighting. There is, however, no satisfactory evidence as to the extent to which this was done, nor in giving their testimony as to this did any of the witnesses differentiate between the poles and wires which were put up within the section of the city mentioned in the agreement of the 30th August, 1883, as extended by the resolution of the council of the 10th December, 1883, and those put up outside of that section; nor is there any satisfactory evidence that it was known to the appellant that separate poles and wires were being put up or used for supplying electricity to private consumers. That it was not known to McGowan, the officer of the appellant who had charge of the street lighting, and whose duty it was to direct where the poles for street lighting were to be placed, is testified by McGowan; and that is not to be wondered at when it is remembered that it was not only the poles to which the electric lamps were suspended that were required to be erected for the purposes of that service, but that it was necessary to erect other poles for the purpose of conducting the electricity to the poles to which the lamps were suspended, especially if the course which the witness Orr, who had been the respondent's superintendent of overhead construction, testified he had pursued, of taking care that the appellant's officers should not be informed of the putting up of poles which were being put up without a special permission from the appellant, was the course generally adopted by the respondent.

The fact that, after the underground agreement was entered into, the two systems, that is, the underground and the overhead, "interlaced," as it was called, was much relied on by counsel for the respondent. What "interlacing" means is, that the underground system was not continuous in parts of the city, but there the electrical current was carried part of the way by underground wires and part of the way by wires strung on poles, and in several places the underground system was adopted at considerable distances from any other part of that system. As I understood the argument, it

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was that where this practice was followed by the respondent, to deny to it the right to maintain its connecting links on the overhead system would be to prevent it from exercising the right which the agreement admittedly confers.

I am unable to appreciate the force of this argument. The respondent had practically the right to use the underground system wherever it chose to adopt it; and, assuming that it had no right to use the overhead system, it could not, in my opinion, by adopting an interlacing system, acquire the right to use the overhead system for the purpose of connecting unconnected parts of its underground system or of feeding a detached underground system.

The fact that the respondent had erected poles and was supplying electricity to private consumers in what are now sections of the city, before any electrical street lighting was begun there, was relied upon by counsel for the respondent to shew that the appellant must have known that the respondent was carrying on its business there without having obtained any permission from the appellant to do so. These sections are mentioned by the witness Waters, and are referred to as North Parkdale, North Rosedale, York Loan district, the Upper Canada College district, the Annex district, and Beatrice and Grace streets.

None of these districts, except that in which Beatrice and Grace streets are situate, formed part of Toronto before 1887. The Annex district was added to the city in 1887; the York Loan district in 1888; North Parkdale in 1889; the Upper Canada College district since 1904; and North Rosedale in 1905; and, if the respondent was supplying electric light to private consumers in these districts before they became part of Toronto, it was of course not being done under any arrangement with the appellant, and the consent of the appellant to its being done was not required or given.

The limits of Toronto have been extended from time to time since the respondent was incorporated, and its area is now nearly three times as great as it was at that time. The respondent's witnesses, in estimating the number of poles erected by the respondent yearly, took no account of this or of the fact that the respondent was carrying on its business in the added districts

before they became part of the city, and included in their estimates the poles that were erected in those districts before that time.

Giving full effect to the evidence upon which the respondent relies to prove that the appellant knew of and acquiesced in the respondent doing what it could not lawfully have done unless with the consent of the appellant, it is, I think, overborne by the evidence of the circumstances pointing the other way, with which I have dealt. In a case such as this, great weight is to be attached to the documentary evidence, and practically all of it is opposed to the contention of the respondent; and, in my opinion, as I have said, the proper conclusion is, that the respondent all along knew that it had no right to use the streets, highways, and public places of the city without the permission of the appellant, and that it had not obtained any general permission to use them.

It may be said that it is most unlikely that the respondent would have gone on extending its lines and services and expended as much money as it has expended, if it knew that it had no right to use the streets, highways, and public places of the city for the purposes of its business, or that its right to use them was subject to be put an end to at any time when the appellant willed to determine it. I have already stated my view as to this, and I have only to add that the course taken by the respondent with reference to other matters indicates that it was ready to take the chance of doing what it had no right to do, believing that it was improbable that its action would ever be called in question, at all events so long as its service was satisfactory to the public.

I refer to its operations in Parkdale and in the township of York. Parkdale was until 1889 a separate municipality, and formed no part of the city of Toronto, and it is clear, I think, that what was done in these two municipalities was *ultra vires* the respondent. Its only authority was to carry on its operations in Toronto, and it clearly had no power, with or without the consent of Parkdale or of the township of York, to use the streets, highways, and public places of either municipality for the purpose mentioned in sec. 2 or for any purpose, except possibly for the purpose of transmitting to Toronto electricity from

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the source of production if it were produced at a place within the limits of either of these municipalities distant not more than ten miles from Toronto. (Section 82 of the Gas and Water Companies Act.)

There remains to be considered the question whether the agreement of the 13th November, 1889, confers upon the respondent the right to establish and maintain an overhead system throughout the city. I infer from the reasons for judgment of my brother Middleton that this question was not raised before him; but, if it was raised, the argument that this right is conferred by the agreement was not given effect to by him; and, in my opinion, the agreement does not confer it. It is clear that the object of the agreement was to confer the right to use an underground system. It was that right that the respondent had applied for, and full effect is given to every word of the agreement, including its recitals, if it is read as a grant of the right to establish and maintain an underground system.

The reference in the recitals and in the operative part of the agreement to the overhead system was designed, I think, to prevent the agreement from operating to take away any rights which the respondent possessed to use the overhead system; and, as I have already pointed out, the respondent possessed that right under the agreement of the 30th August, 1883, the resolution of the 10th December, 1883, and the existing street lighting contract, subject to the conditions embodied in them.

It was also contended that, as is the fact, the right of purchase by the appellant, for which the agreement provides, extends to "all the interest and assets of the company, comprising plant, buildings, and material, used or necessary for the carrying on of its business," and indicates that it was intended that the grant should extend to the overhead system.

There are, I think, two answers to this contention. Although the agreement of the 30th August, 1883, provided for the removal of the poles, wires, and appliances that should be erected or placed under the authority of it, it might be desired by the appellant to purchase them, and, if a street lighting contract should be in force, to purchase the street lighting equipment, and the terms of the agreement were made wide enough to cover

such contingencies; in addition to this, it might well be that in the future permission might be given to install an overhead system in parts of the city, and it was in the interest of both parties that, if this should happen, the equipment for the purpose of that system should form part of that which the respondent was to sell and the appellant was to purchase.

Reliance was also placed on a term of the specification for the last street lighting contract that "the successful tenderer shall have all the rights with respect to the sale of electric heat, light, and energy throughout the city which the present contractors are legally entitled to, so far as the city can legally grant the same, upon entering into an agreement or agreements with the city to the same effect as the agreement or agreements with the present contractors, except the clause for the purchase of the property and works of the said tenderer, which shall be the same in effect as that provided for between the Toronto Railway Company and the City of Toronto, by paragraph 4, sub-sections 2, 3, 4, and 5, of 55 Vict. ch. 99, so far as the same is applicable, provided that the right to purchase shall arise at the same time as the right to buy out the present contractors. . . . Alternative tenders will be received for lighting the city streets, but without any rights as conferred by this section" (sec. 26).

I am unable to see anything in this term of the specifications which helps the respondent. All that is promised is that the successful tenderer shall have "all the rights with respect to the sale of electric heat, light, and energy throughout the city which the present contractors" (i.e., the respondent) "are legally entitled to, as far as the city can legally grant the same." The respondent had legal rights for these purposes under the agreement of the 13th November, 1889, and under the agreement of the 30th August, 1883, and the special permissions that had been given; and, if these were all the rights it was legally entitled to, that was what the successful tenderer would be entitled to; and, if the respondent were legally entitled to any other rights, the tenderer would be entitled to them also.

It appears to me that the words "legally entitled to" were used for the express purpose of excluding from what the successful tenderer was to have, any rights claimed or *de facto*

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being exercised by the respondent to which it was not legally entitled. It is to be borne in mind that, at the time the specifications were prepared, the respondent was asserting the right to an overhead system and the appellant was denying the right unless the poles were erected by its permission, and that the appellant had already taken the position, which it afterwards in a former litigation unsuccessfully sought to maintain, that the respondent had forfeited its right under the agreement because, as it was contended, it had in breach of it amalgamated with another electric light company.

If by the agreement the right to use the streets, highways, and public places of the city for the purpose of an overhead system would have been forfeited on breach of the condition as to amalgamation, yet in the former litigation, in which the agreement was the groundwork of the action, it was not suggested in the pleadings or throughout the litigation that by it there had been conferred upon the respondent any right except the right to use the streets, highways, and public places of the city for the purposes of an underground system. While this may not help to a conclusion as to the legal effect of the agreement, it affords cogent evidence of what the parties intended to provide for by it and of what they thought was its legal effect.

Upon the whole, I am of opinion that the respondent has the right to use, for the purposes mentioned in sec. 2, any of the streets, highways, or public places of Toronto for the purposes of an underground system, under and subject to the terms and conditions of the agreement of the 13th November, 1889; but that for the purposes of an overhead system it has no right to use any of the streets, highways, or public places except such of them as lie within the section of the city mentioned in the agreement of the 30th August, 1883, and such of them as to which the special permission of which mention has been made was given, and, as to these, subject to the terms and conditions of the agreement by which the permission was granted.

If the right of the respondent to use the streets, highways, and public places of the city be thus limited, as, in my opinion, it is, and loss results to the respondent, the fault lies at its own door. The provisions of the law under which it was incorporated

are plain, and appear to have been fully understood by the respondent; and yet, putting its case on the highest ground on which it can be put, with this knowledge it went on extending its operations and making the large expenditures which it has made, entirely disregarding the limitation of its powers which the statute itself imposes, and without taking the trouble even to make application to the appellant for its consent. It may be that, as my learned brother must have thought, if application had been made the consent would have been given; but that, in view of the course which from the outset the appellant adopted, I do not think.

I have dealt with the case at considerable and perhaps too great length, but I have done so because of the important interests which are at stake, and with a desire to make clear the reasons which have led me to differ from the conclusion which was reached by my brother Middleton.

Having come to the conclusion I have reached, it is unnecessary for me to consider the question whether the respondent's rights extend to territory added to the city since the letters patent were issued.

As the poles for the cutting down of which the action is brought were not being erected within the section of the city mentioned in the agreement of the 30th August, 1883, or under any permission to erect them given by the appellant, the result is that, in my opinion, the appeal should be allowed and there should be substituted for the judgment which has been directed to be entered, a judgment dismissing the action, the whole with costs.

MAGEE, J.A.:—I agree.

HODGINS, J.A.:—It is important to emphasise the statutory and corporate rights of the respondent. The latter include the right "to set up, maintain . . . in and upon and under the streets, squares, and public places of the . . . city of Toronto all wires, lines, tubes, pipes, poles, posts, and all other apparatus and appliances to enable said company to supply and distribute . . . electric light and power."

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These powers, if uncontrolled, would give the respondent all it claims in this action, either on or under the streets, and would not necessitate any agreement regarding poles or underground conduits.

The statute under which the letters patent were issued contains the following as sec. 2: "Every company incorporated under this Act may construct, maintain, complete and operate works for the production, sale, and distribution of electricity for purposes of light, heat and power, and may conduct the same by any means through, under and along the streets, highways and public places of such cities, towns and other municipalities" (i.e., cities, towns and municipalities in which the company is authorised to carry on its operation), "but as to such streets, highways and public places only upon and subject to such agreement in respect thereof as shall be made between the company and the said municipalities respectively and under and subject to any by-law or by-laws of the councils of the said municipalities passed in pursuance thereof."

The fact that no by-law is required to express the assent or leave of the municipality is shewn by the cases of *Township of Pembroke v. Canada Central R.W. Co.*, 3 O.R. 503, and *Port Arthur High School Board v. Town of Fort William*, 25 A.R. 522. But I do not think that those decisions cover a case where rights are to be exercised upon and subject to an agreement with the municipality; which is quite a different thing from mere assent or license, especially where, as here, the agreement is intended to be followed by a formal by-law "passed in pursuance thereof."

It is argued that acquiescence can take the place of the agreement and by-law expressly required by the statute.

The limits of the doctrine of acquiescence are well expressed by Fry, J., in *Willmott v. Barber* (1880), 15 Ch. D. 96, followed in *Hoare v. Kingsbury Urban Council*, [1912] 2 Ch. 452, and accepted in Halsbury's Laws of England, vol. 13, p. 167, in the "elements of estoppel." During the course of the argument in the former case, Fry, J., remarked (p. 101): "The equitable doctrine of acquiescence is founded upon there having been a mistake of fact." And in giving judgment he thus ex-

presses the elements or requisites of the doctrine of acquiescence (p. 105): "It requires very strong evidence to induce the Court to deprive a man of his legal right when he has expressly stipulated that he shall be bound only by a written document. It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do."

The initial difficulty is, I think, that there was here no mistake by the respondent as to its legal rights. Both parties were aware of the statutory provisions requiring an agreement as a preliminary to the exercise of the powers given under the letters patent.

How can it be said that the respondent mistook its rights or that the appellant knew that the respondent mistook them? Cotton, L.J., in *Russell v. Watts* (1883), 25 Ch. D. 559, at p. 576,

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emphasises this feature, in speaking of acquiescence by lying-by while building was going on. He says: "They did nothing; it is true they saw him going on, but he knew the title and facts as well as they did." Fry, L.J., agrees with him, and restates what I have quoted from *Willmott v. Barber, supra*.

There is also, to my mind, an insuperable difficulty in applying any such doctrine as estoppel or acquiescence, under the facts of this case. If an agreement was necessary under the terms of which the respondent was to operate, how can the conditions of such an agreement be supplied by mere acquiescence or upon the theory of estoppel? What terms or conditions has the appellant acquiesced in? If it were a mere question of assent or leave, without any qualifying stipulations, it would be easy to supply that permission, under proper circumstances, by the equivalent provided by lying-by and not asserting any right while work went on. But it is inconceivable that the protection intended to be afforded by an agreement defining the rights and liabilities under which operations were to be conducted should be swept away and a state of affairs produced in which the mere placing of poles and other appliances in the streets would ripen into a right unlimited in time and unhampered by conditions necessary for the safety and convenience of the public. Both parties are in the wrong if the streets are used except upon and under an agreement. It is the right of the public that the statute is intended to preserve; and, if the city council fail altogether in its duty, I should hesitate long before agreeing that its mere default gave the respondent the extensive privileges it claims in derogation of the rights of the public at large.

The question may be asked, what did the appellant acquiesce in? The answer given is, the erection of poles for commercial lighting. But can that acquiescence be said to go any further than in their erection and maintenance meantime and until an agreement is come to? Must not the situation of the parties be always governed by the statutory provision under which alone the municipal authority gets power to deal with the use and obstruction of the streets by the erection of poles, etc.? But for that provision the council could give no permission, and I find it hard to think that the doctrine of acquiescence can be carried

so far as to make the city's inaction much more far-reaching in its effects than the best-drawn agreement which the respondent could procure would conceivably have been. There does not seem to be any reason for putting the respondent in a more favourable position than that of a party who has still to agree on details which, if not arranged, leave him with an unenforceable contract.

My Lord the Chief Justice has indicated in his judgment, in which I entirely agree, that, so far as the written documents are concerned, the supposed acquiescence is entirely negatived. The existing conditions must be understood and regarded in dealing with the evidence by which acquiescence is said to be established. Toronto to-day, as shewn on the plan prepared by Pickthall, is not the Toronto of 1883-4, nor yet that of 1901. Much of the present net-work of wires, poles, and conduits had its origin in districts outside the city as it was, and when a district was taken there was a ready-made system in that section. There were from time to time telegraph and telephone poles erected in the streets; and the respondent's street lighting poles, rightly there for that purpose, were used for commercial wires. There was a constant renewal and removal of poles, replacing old ones and re-arranging the position of others, and these formed half the yearly number of poles, which are said to have averaged 1,500. Of the whole number of poles the majority were used jointly for street and commercial lighting. In this, Wright and Orr agree.

I mention these facts because it indicates that, save to officials closely following the operations of the respondent, it would not be easy to form and keep a clear appreciation as to the difference in extent of territory or in the number of poles—obviously no one could keep count of the wires—also occupied or used by the respondent from time to time. There should also be mentioned the answers of several of the witnesses which shew that this difficulty was increased by the methods employed. Orr, who was superintendent of overhead construction, and in the respondent's employ from 1885 to 1912, thus deposes (p. 355):—

“Q. In the case of private lighting poles, Mr. Orr, did you see Mr. McGowan? A. No.

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“Q. Then, how did you put them up? A. When I would get an order from them about that certain customers wanted light, I would look the locality up, see the best way to get to them, erect poles, string the wires, and supply the customer.

“Q. Did you see any one from the city other than Mr. McGowan in that connection? A. I did not see him at all in that connection, in connection with it, commercial work.

“Q. Then, did any change occur in 1900 or about that time? A. Yes, sir; about that time, I think, we were prevented from putting up any poles without a permit.

“Q. And you put them up under that permit then, did you? A. Yes, and without them too.

“Q. You put them up without them—did anybody know about that in the city? A. Not if I could help it.”

And at p. 359:—

“Q. Then, in 1901 or thereabouts, you began, as Mr. McGowan says, for the first time, to have agreements in regard to the placing of these private poles? A. I believe it was about that time, Mr. Hellmuth.

“Q. But you kept on, when you could, putting in poles without the agreement at all? A. Yes.”

Waters, for twenty years in the respondent's employ, at present in charge of the overhead construction, and previously Orr's assistant, says (p. 102):—

“Q. I know, but in those first few years, will you say the poles you put up were put up in any single case for anything else than street lighting? A. Yes, they were put up for other things than street lighting.

“Q. In 1897 you speak of? A. Yes, previous to 1897, I know about poles being put up for renting power.

“Q. And that was not connected in any way with street lighting poles? A. No.

“Q. Can you tell me any place? A. On Cameron street.

“Q. What year was that? A. I cannot say now, but it was just very shortly after I started with the company.

“Q. What was that pole put up for? A. Several poles put up to carry power to a factory site.

“Q. Now, is that one of the poles that Mr. McGowan located?
A. No.

“Q. So far as your knowledge goes, did Mr. McGowan know anything about that? A. No.

“Q. Nor any one but yourself? A. We had instructions to put the poles up, and that is all I know about it.

“Q. And that was one of the cases where Mr. McGowan was called in or a permit to locate it? A. No.

“Q. That sticks out in your mind—do any others stick out in your mind? A. Which?

“Q. Where in these early years you put up any line of poles for private customers? A. It was quite common, all over the city.

“Q. Do you remember that now, in any other case? Cameron street stands out—do you remember anything else? A. I remember we ran power out for the time being, up Delaware avenue.

“Q. From where? A. We had poles on Northumberland street and up Delaware for a customer.

“Q. Did Mr. McGowan attend at all for the location? A. No; I did not know Mr. McGowan at that time.”

Wright, for twenty-six years general manager of the respondent company, says (p. 145):—

“Q. Now, Mr. Wright, you say that it was in 1901 that, as you say, this trouble arose first. Prior to that was there or was there not any difficulty about obtaining permission? A. No difficulty at all.

“Q. No questions raised? A. No question.

“Q. Prior to this—the city?

“His Lordship: I am not quite sure that I understand that really. Mr. Wright says there was no difficulty. Does he mean he asked permission and always got it? A. No, we did not ask permission, we were sort of an accepted fact, in those days, and treated as such.”

And at p. 146:—

“Mr. Hellmuth: Q. You did not ask permission? A. We always endeavoured to work in with the city officials in regard to the location of poles and so on.

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“Q. But you did not make formal application? A. There were no formalities. The reason—about this time, I think, Mr. McGowan was put in charge of that work. I think that was the reason of Mr. Rust referring the matter. ,

“Q. So that up to this suit, or threatened suit of 1901, you had been putting in, without permission, poles for the purpose of commercial business, private lighting, without any permits at all? A. That was the practice, yes. I had been doing that for many years.”

Hood, for five and a half years superintendent of distribution in the respondent company, says (p. 258) :—

“Q. When you were about to erect poles, have you been notified not to put them up? A. Not personally I have not, no.

“Q. You say you have not—do you say you have not? That you have not been notified? A. I have never seen any personal notice except from the city, or not from the city, but from the police department.

“Q. That is all right, whatever it is; not to put up poles, was it? A. They have notified us they were not going to allow us to put them up.

“Q. On a certain street and in certain places? A. In a certain location.

“Q. What did you do—did you put them up? A. In most places I think we did.

“Q. And when did you put them up, the same day or the day after or at night, or? A. Oh, at day-time.

“Q. Would you stop when they told you in the first place, and go away, or would you go away, or what? You can answer my question; you have done it before. A. In some cases they were put up while they were there.

“Q. You put them up anyway? A. Yes.

“Q. Did you sometimes go away and come back? A. In several cases I believe we did.”

A letter of the 7th November, 1901, from the city solicitor to the council, alleged by counsel for the appellant to shew that that was the first time the council got notice that the respondent was putting up poles for commercial wires, was ruled out at the trial; but, in view of the fact that the knowledge of the council

is important when dealing with their action, it would have been more satisfactory if the letter had been allowed in.

I do not think it can be denied that it would, under the foregoing circumstances, be difficult to know exactly just where and when the respondent overstepped the mark.

McGowan, who from 1888 was in charge for the appellant of street lighting, succeeding Ashfield, says (p. 337) :—

“Q. Did you know of any other pole that was being erected at any time after 1901 otherwise than under one of these authorities? A. No, sir, I do not know of any.

“Q. And you do know, I understand, previous to 1889, and I suppose as you went on, that the company was doing a private business? A. Oh, yes.

“Q. That was apparent to you as you went about—I believe you told my learned friend that? A. Yes.

“Q. What was it doing its private business from? I mean what class of pole, prior to 1901, we will say? A. From the poles that were used for street lighting purposes?

“Q. From the poles that were erected for street lighting purposes? A. Yes, in many instances.

“Q. I beg pardon—in many instances, what do you mean by that? A. That is as far as I know.

“Q. What do you mean by many instances—that is rather vague? A. They might have had poles other than those, however.

“Q. You are only speaking of your own knowledge? A. Yes.

“Q. Did you know of any? A. No.”

And at p. 338 :—

“Mr. Geary: Then, Mr. McGowan, did you know yourself of any erection of a pole by the company otherwise than for street lighting prior to 1901? A. No, I did not know of any other.

“Q. Did you know of any after—you have told me after 1901 you did not know of any, I think? A. No.

“Q. Did you report to anybody in regard to the private lighting of the company? A. Regarding the private lighting?

“Q. Regarding the private lighting of the company, the business that you said you knew they were doing? A. No.”

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And at p. 339:—

“Q. Then, Mr. McGowan, from this time, from 1888 until this termination in 1911 or thereabouts, you continued your location of poles—tell me what that involved? A. It involved the location of poles where they were required for street lighting purposes and in regard to street lighting purposes only.

“Q. You have said it was under certain agreements—did you locate them under certain agreements? A. Yes.

“Q. Were you aware largely of the operation or were you aware of the operations of the company by that means? A. Fairly well, yes.

“Q. Now would you, Mr. McGowan, tell me what were your opportunities for observing the company’s operations? A. Well, I had to locate the lamps in the first place, send them the order for it, and, after they had completed the work, go and see that it had been done properly.

“Q. Was there an opportunity, in short, in the exercise of your duties, to observe the operations of the company? A. Yes.

“Q. Now tell me what you mean, shortly, by locating, what do you mean by locating? A. To point out definitely the positions in which the poles were to be placed.

“Q. What poles—all the poles? A. Not so much the leader line poles, but the lamp poles.

“Q. The lamp poles? A. Yes.

“Q. There was another class of poles connected with that? A. Yes, they are called the line poles.

“Q. Did you have anything to do with the line poles? A. No more than to see that the requisite number was not exceeded.

“You did have something to do in connection with this, so that they came under your observation? A. Yes.”

And at p. 351:—

“Then questions 86 to 88 (of examination for discovery):—

“Q. 86. When was it that these agreements started? A. I think about 1900 or 1901.

“Q. 87. So that prior to that they had been putting up poles without ‘by your leave’ at all? A. Yes, the poles which they did put up, they had no special permission from the council to do it.

“Q. 88. And there were a great many of those, were there not? A. There were a number of those in various places.”

(Then questions 91 to 94 inclusive.)

“Q. 91. Now, from 1888 or 1889, whenever you came in, up to 1900 or 1901, the date you speak about—in those twelve or thirteen years, the company’s plant had become a pretty extensive plant? A. It was gradually extended.

“Q. 92. It was a pretty large plant at that time? A. Yes.

“Q. 93. And pretty well covered the city? A. Yes.

“Q. 94. And it was in 1900 and 1901 that the question about getting permits or agreements first arose? A. Yes.

“Q. Is that all right? A. Yes.

“Q. Then there is another question if that is right, that there was a putting up of poles for private lighting before 1900 or 1901, without any agreement, or of any special nature, Mr. McGowan? A. Do you wish me to answer that?

“Q. You have said so, haven’t you? A. I said so, but I was not aware of that, not until 1901.

“Q. But it had been going on? A. Apparently it had, but we did not know of it till then.

“Q. It had been going on? A. I believe it had.

“Q. You said it had? A. Yes.

“Q. You do not want to take it back; it had been going on, and you could not say, looking at this map, and you have not admitted to us, that there was not private lighting that was carried on poles that were not carrying street lighting? A. That is right.

“Q. That is right—you cannot say that, you do not attempt to say it: then you knew in 1900 or 1901 that the city had threatened and subsequently brought an action to forfeit or cancel the company’s franchise for alleged amalgamation or purchase of the incandescent? A. Yes, I remember something about that.

“Q. Yes, you remember something. That will do.”

Re-examined by Mr. Geary:—

“Q. You replied to my learned friend in regard to your knowledge of these agreements that you learned of it in 1901—is that what you said? A. Yes.

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“Q. Did you know before 1901? A. No, I did not know before 1901.

“Q. That any pole was going up except for street lighting? A. Except for street lighting purposes.

“Q. And you learned it then? A. Yes.

“Q. And the agreements that you refer to are those that we have here of 1901? A. Yes.”

Mr. Harris, the present city commissioner and engineer, says in cross-examination by Mr. Hellmuth (p. 334):—

“Q. Mr. Harris, the Toronto Electric Light Company have been to your knowledge, for a number of years, supplying electrical current and power to private individuals and factories in the city of Toronto—to your knowledge that has been going on? A. Yes, sir.”

Upon the whole evidence, I think it is fair to conclude that the knowledge and acquiescence of the city corporation, if it is to be fairly proved, must depend rather upon documents than upon the admissions of the city officials.

The written evidence is so fully dealt with in the judgment of my Lord the Chief Justice that I can add nothing to his discussion of it.

I think, taking it and the oral testimony together, that the fair result is, that the city, through its officials, had opportunity to see and know of the extension of the pole system beyond that used for street lighting, and that, if they had had an electrical department, attention would have been called to it. No attempt has been made to ascribe knowledge to the fluctuating body of controllers and aldermen except what was conveyed by the various reports and documents put in. That commercial lighting was done, and was known to be done, is not denied, but what is urged, and in my view rightly urged, is, that the more detailed and exact knowledge of the erection of specific poles for that purpose alone has not been demonstrated. It is evident from the evidence of the witnesses that concealment was practised and permission only got when it was unavoidable. Can, then, the words used by the Court in *DeBussche v. Alt* (1878), 8 Ch. D. 286, at p. 314, be applied to the appellant? Did the city “stand by in such a manner as *really* to induce the person

committing the act, and who *might otherwise have abstained* from it, to believe that he assents to its being committed?"

It is well worthy of note that no witness asserts that the proceedings of the respondent were taken under the belief that the appellant had no rights or never meant to assert any, or that the respondent drew from the city's inaction the inference that it might safely proceed. Unless it can be said that the city's conduct amounted to a representation that what the respondent was doing was not an invasion of public rights, I can see no reason why the Court should assume that the respondent was misled, if no one on its part deposes to that fact.

Knowledge by the city corporation, clear and decisive enough to enable a Court to hold that its present defence is in the nature of a fraud, is not, to my mind, established; and I cannot see that the means or opportunity of knowledge can cure that defect.

Acquiescence depends upon knowledge, and I am unable to understand how the absence of it, even though due to negligence or carelessness, can form an equivalent. It would be a contradiction in terms.

The position of the respondent is certainly peculiar and unfortunate, if the result of this action is to define its rights on the street partly as those of a trespasser, where it admits putting up poles designedly without notice or permission, or as those of a mere licensee where assent was given to the erection in the other cases not covered by the agreements. If the agreement or agreements which stipulate for removal are in force, as I think they are, then performance of that condition will cover most of the system, and leave little to be dealt with under other conditions. If the principle enunciated in *Ramsden v. Dyson* (1866), L.R. 1 H.L. 129, at p. 141, by Lord Cransworth, is applicable, the respondent will have to be left to the magnanimity of the city council, if that attribute can be assumed to exist in such a body. The Lord Chancellor in that case said: "For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights."

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The effect of the agreement of 1889 has been fully discussed in the judgment of my Lord the Chief Justice. The recital is consistent with the fact that the poles, erected and used for street lighting, also carried commercial wires, the use of which was apparently known to the city officials. The words of addition in the grant are open to a similar observation. It was only a few months before that, viz., on the 1st February, 1889, that the parties had agreed for the supply of incandescent and are lights for the further lighting of the streets.

I am of the opinion that the appeal should be allowed with costs, and the action dismissed with costs.

GARROW, J.A. (dissenting):—Appeal by the defendant from the judgment of Middleton, J., at the trial, in favour of the plaintiff. The action was brought for an injunction to restrain the defendant from removing or otherwise interfering with the poles and other plant belonging to the overhead system of electric lighting of the plaintiff, situated upon the streets of the city of Toronto.

The material facts appear to be fully set out in the judgment as reported in 31 O.L.R. 387.

A by-law of the city council was not necessary: *Township of Pembroke v. Canada Central R.W. Co.*, 3 O.R. 503, followed in the Court of Appeal in *Port Arthur High School Board v. Town of Fort William*, 25 A.R. 522. These cases shew what is now well-established, that the provisions of the Municipal Act requiring municipal councils to act by by-law do not apply to special statutory powers such as are here in question. There should, of course, to be regular and businesslike, have been at least a resolution of the council authorising the agreement, then an agreement duly executed by the parties, followed, if considered necessary, by a by-law of the city council. That is the plain and simple course intended by the statute, which, if followed, would have obviated the present contest.

The cases also shew that the right to take objection to the absence of an agreement or of a consent by a municipal council, in such circumstances, may be lost by acquiescence; see the several cases cited in the *Pembroke* case, *supra*; which seems to

narrow the real question between the parties to a consideration of the facts and circumstances appearing in evidence, from which the necessary inference of acquiescence may properly be drawn.

To begin with, the statute contemplated that the city streets might be used for the plaintiff's purposes. Such a proposed use was no novelty; for other companies, such as the telegraph and telephone companies, were using the streets for a similar purpose; a purpose and use which does not apparently interfere with the primary use of the streets for public traffic.

When the plaintiff company was incorporated in 1884, there was no other electric light company in the city. Light until then had been supplied by the gas company or by coal oil lamps. The advent of the plaintiff company as a competitor with the gas company, for both streets and private lighting, must, one would think, have been hailed by the average citizen—which would of course include the members of the city council—as a very palpable advantage, and cause the plaintiff company to be regarded as a benefactor to be encouraged rather than as an enemy to be watched. Considerations such as these do not, of course, supply the want of the necessary statutory consent; but, on the question of acquiescence, they go a long way to account for and explain the conduct of the parties in neglecting to make a formal agreement, which it is, I think, obvious could have been had in the beginning for the asking. And, if it was blameworthy on the part of the plaintiff not to have obtained a proper title before placing its property on the streets, the defendant is surely not free from blame for permitting the city streets to be unlawfully occupied, as they otherwise were, by the poles and wires placed therein by the plaintiff.

Then the recital in the 1899 agreement, set out in the judgment at pp. 392, 393, expressly admits that the plaintiff then had upon the streets an overhead system, which, under the circumstances, could only mean a system lawfully founded upon the necessary statutory consent. By that agreement the defendant obtained a right to purchase the property which in part it now seeks to destroy, so that the terms and construction of that agreement may not unfairly be said to be directly and not collaterally

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involved in this litigation; in which event the recital would probably amount to an estoppel.

In *Carpenter v. Buller*, 8 M. & W. 209, Baron Parke thus states the rule (pp. 212, 213): "If a distinct statement of a particular fact is made in the recital of a bond, or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true, that, as between the parties to that instrument, and in an action upon it, it is not competent for the party bound to deny the recital. . . . But there is no authority to shew that a party to the instrument would be estopped, in an action by the other party, not founded on the deed, and wholly collateral to it, to dispute the facts so admitted, though the recitals would certainly be evidence." And this statement of the law was approved in the Court of Appeal in *Ex p. Morgan*, 2 Ch. D. 72, 89.

In any event, the recital, as a mere matter of evidence, is at least as strong as the resolution of the council which was held to be sufficient in the *Pembroke* case, or as the letters from which an inference of assent was drawn in *Regina v. Great Western R.W. Co.*, 21 U.C.R. 555.

In the face of this recital and of the other circumstances, it is, in my opinion, quite out of the question to regard seriously the defendant's contention that it was ignorant of what was being done upon the streets of the city. The defendant is the lawful custodian of the streets, for the management of which it has an abundant, and no doubt well-paid, staff of engineers, inspectors, etc.; and it was their duty to know, and I have no doubt they did know, from the beginning, exactly what was being done.

Altogether, and without further repetition of what has already been well said by Middleton, J., the circumstances seem to me amply to justify the plaintiff's contention that from the beginning it had, or at least in good faith believed it had, the actual consent of the defendant to the use which was being made of the streets for the purposes of its overhead system, and that the defendant, in fact if not in form, was consenting, and intended the plaintiff to believe, or so acted as to lead it honestly to believe, that it was consenting, and that a formal consent need not be obtained.

The remaining question is as to the nature and extent of the assent to be thus inferred; and upon that branch of the case I also agree with Middleton, J., and for the same reasons which he has given.

The appeal should, in my opinion, be dismissed with costs.

Appeal allowed; GARROW, J.A., dissenting.

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[APPELLATE DIVISION.]

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Principal and Agent—Insurance Agent—Fire Insurance Contracts Obtained for Principal—Payment of Amount of Premiums to Agent—Course of Dealing between Agent and Insurance Companies—Acceptance of Agent as Debtor—Res inter alios—Validity of Policies—Notices of Cancellation—Duty of Agent.

The defendant, an insurance agent and broker, was employed by the plaintiff company to effect insurances against fire upon property of the plaintiff company. He obtained (through one R.) and delivered to the plaintiff company five policies, one issued by each of five insurance companies, and was paid by the plaintiff company the amount of the premiums in respect of the five policies. To effect the insurances, the defendant employed a brokerage company, the finances of which he controlled, and of which R. was manager. The brokerage company being largely indebted to the defendant, the money which he received from the plaintiff company was not paid to the brokerage company or to R. or to the insuring companies; but the defendant credited to the brokerage company the amount of the premiums, and the brokerage company debited it to the defendant; R. also debited the brokerage company with the amount of the premiums; and four of the five companies each debited the amount of its premium in its books to R., he being the agent of these four companies:—

Held, that the proper conclusion upon the evidence was, that each of the insuring companies looked to its agent as its debtor for the amount of these premiums, and not to the plaintiff company; thus the premiums had been paid to four of the companies; the payment was absolute; and the plaintiff company was discharged from liability to pay, the transactions between R. and the insuring companies not being *res inter alios*. *London and Lancashire Life Assurance Co. v. Fleming*, [1897] A.C. 499, explained and distinguished.

Held, also, that notices of cancellation given by the four companies were insufficient to put an end to their contracts, because there was neither return nor offer to return the unearned premiums that had been paid. And, therefore, the defendant, having procured for the plaintiff company binding contracts from the four insuring companies, was not liable to the plaintiff company for breach of duty in respect to them.

But in the case of the fifth company, of which R. was not the agent, the premium was never received by its agents, P. & Co.; and therefore, when that fact became known to the company, P. & Co. were entitled to be credited with the amount of the premium which had been charged to

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them, and the premium was therefore never paid to the company, and it had the right for that reason to repudiate liability on the policy. The defendant's whole duty was not performed when he obtained the policies and delivered them to the plaintiff company; what he undertook to do was to procure binding contracts of insurance, and to do all that was necessary on his part to procure them, which involved the payment of the premiums; and, having failed in that duty, in respect to the insurance with the fifth company, he was liable to the plaintiff company for the loss occasioned thereby.

Judgment of MIDDLETON, J., varied.

THIS action was brought to recover from the defendant the amount of the loss sustained by the plaintiff company by reason of the destruction of its property by fire on the 22nd June, 1912. The plaintiff company alleged that the defendant was employed by it as an insurance agent or broker to place insurance upon the property afterwards destroyed; and that, by reason of the breach of the defendant's duty, the insurance was not valid, and the plaintiff company was not indemnified in respect of the loss which it sustained.

March 11 and 12 and September 14, 1914. The action was tried by MIDDLETON, J., without a jury, at Toronto.

F. Arnoldi, K.C., for the plaintiff company.

C. A. Moss, for the defendant.

September 22, 1914. MIDDLETON, J.:—The defendant had acted as agent or broker in the effecting of insurance on behalf of the plaintiff company for some years. A change had taken place in connection with the premises, and the defendant wrote to the plaintiff company suggesting that, as the result of this change, it would be advisable to have the insurance re-adjusted. In consequence of this, instructions were given to the defendant to place an insurance to the extent of \$2,500 upon the stock and \$1,100 on the fixtures: \$3,600 in all.

In pursuance of this arrangement, Gurofski made application and placed the insurance with five companies: the National Protector Insurance Company Limited of Liverpool; the Security Mutual Fire Insurance Company of Chatfield, Minnesota; the North American Mutual Fire Insurance Company of Mansfield, Ohio; the Colonial Assurance Company of Winnipeg; and the National Assurance Company of Elizabeth, New Jersey.

The premiums upon these policies amounted in all to \$110, and the plaintiff company paid this amount to Gurofski, partly in cash, partly by note, which was paid in due course, and partly by a refund of premiums to which the company was entitled upon the surrender of the earlier policies. The policies were all sent to Gurofski, and by him handed over to the plaintiff company, which for some time assumed that everything was in a satisfactory position.

The policy of the Security Mutual company bears date the 19th January, 1913; the other four policies bear date the 16th December, 1912.

The first intimation that the plaintiff company had concerning the policies was the receipt of two letters from the North American Mutual Fire Insurance Company, dated the 18th March, 1912. These were a circular letter explaining the necessity for the making of a further call, and an assessment notice calling for payment of \$3.12, being an assessment with respect to losses incurred long before the issue of the policy. Concerning this, some conversation is said to have taken place between Mr. Goodman, the more active member of the plaintiff company, and the defendant's brother Joseph. Mr. Goodman's recollection is that Mr. Joseph Gurofski advised that no attention be paid to this notice, as the assessment would be charged up to the defendant and attended to in due course. This conversation is emphatically denied by Mr. Joseph Gurofski; and I think that, if there was any such conversation at all, it is clear that Mr. Joseph Gurofski could not and would not have undertaken any liability with reference to the premium. I am inclined to think that it was a mere chance remark in the street, to which neither party at the time attached any importance whatever.

On the 15th April, 1912, a notice was sent to the plaintiff company by W. L. Pettibone & Co., Newark, purporting to be agents for the Security Mutual company, notifying the plaintiff that the premium on the policy of that company was unpaid, and that, unless paid by the 20th April, the policy would be cancelled, and liability for loss under the policy would thereupon cease. To this is appended a postscript: "This is to con-

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firm our notice of the 15th ultimo that this policy has been cancelled on our books." The earlier notice, if there was one, has not been produced. This notification was followed by letters of the 2nd May, asking for return of the policy or payment of the full premium if re-instatement was desired, and of the 17th May, demanding return of the policy or cheque by return mail. As both these letters refer to the letter of the 15th April as the notice of cancellation, I think it should be found that that was the first notice actually sent.

On the 25th May, Charles E. Ring & Co., acting for the National Protector Insurance Company and the Colonial Assurance Company, wrote two letters to the plaintiff advising it that the premiums on the policies in these two companies remained unpaid, and that, unless paid on or before the 30th May, the policy would be cancelled, and all liability under it would then cease, and demand would be made for the earned premium to that date.

On receipt of some one or more of these notices, Mr. Goodman saw the defendant, certainly on one occasion, probably on more than one occasion, and was informed by him that the premiums had been duly paid, and that the policies were all right.

To understand the situation, it is now necessary to ascertain exactly what had been done by the defendant. He was not an agent for any of the insurance companies. This fact was thoroughly understood by the plaintiff company. It was also known that, owing to the nature of the property to be insured, the risk could not be placed with any of the ordinary companies, but would have to be placed with companies of a class that were ready to accept risky policies; none of these companies having its head office in Ontario.

The Insurance Brokerage and Contracting Company was a company formed for the purpose of negotiating insurance of this class. Its career had been suspended by a winding-up order; but Mr. Gurofski, C. E. Ring, and one Carroll had purchased the assets of the company in liquidation from the liquidator, assuming and undertaking to pay all the then outstanding liabilities. This arrangement had been sanctioned by the Court, and the

winding-up order had been vacated. All the stock had been transferred to a nominee of Gurofski, who held it upon trust to be distributed among the three adventurers when the advances made by Gurofski for the payment of liabilities should be recouped.

Prior to this, Mr. Ring had been carrying on business under the name of C. E. Ring & Co. He was agent for three of the insurance companies, and he had business connection with brokers or agents representing the other companies. When the Insurance Brokerage and Contracting Company was reorganised, Mr. Ring was made its general manager. It was not thought desirable to change the agency for these companies from Ring to the brokerage company; so Ring retained the agencies, but his business was carried on in the brokerage company's office, and the earnings were to be treated as assets of the brokerage company, and he was to receive for his remuneration a salary payable by the brokerage company.

For the purpose of placing the brokerage company upon its feet, the defendant made, as contemplated, considerable advances to it, and at the time of the transaction in question the company was indebted to him in a large amount of money.

When Gurofski received these applications from the plaintiff for insurance, he turned them over to the brokerage company, and Mr. Ring issued policies in the companies for which he was agent, and transmitted the application with respect to the Security Mutual company to Mr. Pettibone. The premiums upon these policies were throughout carried into accounts current. Ring charged them to the Insurance Brokerage and Contracting Company, and credited them in his books to the insurance companies. The Insurance Brokerage and Contracting Company gave Ring credit and debited Gurofski. Gurofski credited the Insurance Brokerage and Contracting Company upon its account current, and kept the money, as the balance was largely in his favour. The insurance companies for which Ring was agent, on his instructions, charged the premiums to Ring in their books. Substantially the same thing took place with regard to the other policies, save that in the case of the one effected through intermediate brokers the chain was longer.

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After these transactions were put through the books, Gurofski made further advances to the Insurance Brokerage and Contracting Company, amounting to \$1,300. This money was paid by way of loan, and not by way of accounting for any of the premiums received by him in respect of business which he had turned over to the company.

The brokerage company was just kept floating by the money received by it, including the advances made by Gurofski, and it had only a small current balance at its credit at any time. For Gurofski's protection, it had been arranged that no money should be paid by it without his signature to the cheque, so that Gurofski knew that the company was not in fact paying over to Ring & Co. the amounts due for premiums.

In all these transactions the credit given for the premiums was in accordance with the understanding between the different parties. The case is not one where there was any dishonest attempt to appropriate moneys; the course of dealing was in accordance with the well-understood relationship of all the parties. In this, of course, I do not include the plaintiff company. It was no party to what was taking place. It paid its money to the insurance broker, got the policies, and rested content.

When, in May, Ring & Co. wrote the letter above referred to, there had been a falling out between Ring and Gurofski. The reorganised Insurance Brokerage and Contracting Company had not been a success. It went again into liquidation. Ring repudiated all liability with respect to the premiums that had not actually reached his hand, and sent out the notices in question to free himself from liability to those who had given him credit. They in their turn did not seek to hold him liable if he could bring about the cancellation of the outstanding policies.

Reverting now to the position of the plaintiff company: these repeated notices that the premiums which had been paid to Gurofski had not reached the companies, caused it anxiety; and, although satisfied at first, the plaintiff became restless afterwards and quite dissatisfied with Gurofski's explanation. Some days prior to the 22nd June, the plaintiff consulted its solicitor. The situation was placed before the Crown Attorney, and he

apparently advised prosecution of Gurofski for having stolen the premiums. An information was laid before the Police Magistrate early on the 22nd. Later on in the same day, the fire occurred, which resulted in practically a total loss of the property insured.

Upon claim being made against the insurance companies for the amounts which each was called upon to pay upon adjustment, the insurance companies, as might be expected, refused to pay. Subsequently the National (New Jersey) settled its liability—\$812.39, according to the adjustment—for \$700. The plaintiff company now looks to Gurofski to make good the loss that it has sustained by reason of the fact that the policies are not, it is said, binding upon the companies.

An agent who receives money to be paid for his principal has no authority to set this off against a debt due from the payee to him. His duty is to pay; but, if the payee assents to the set-off, it becomes payment. There is no necessity for the form of handing over the money and then handing it back. The assent to the set-off dispenses with this.

Here the set-off was assented to by the agent of the insurance companies, and the amount of the premium was carried into the running accounts between the parties. The insurance companies parted with the policies, being content to carry the premiums into the running account between the different agents and sub-agents.

The plaintiff having paid the premium and the policies having been delivered, under the circumstances they were valid policies, and the defendant has been guilty of no default.

The action fails and must be dismissed. Though I have much sympathy for the plaintiff, I can find no reason for withholding costs.

After I had prepared the above judgment in this case in June last, application was made to me for leave to recall Mr. Ring for the purpose of shewing that credit was given by the firm of Ring & Co. to the insured, and not to the intervening brokers, either the brokerage company or Gurofski. I do not know, in the view I have taken of the case, that this is really

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material. No doubt, the premiums were charged by Ring to the customer. This course was adopted by him, he says, on the advice of his solicitor, so that he would be able to look to the customer direct if the agent did not pay over the premium. I cannot regard this as being the real situation. It was an endeavour to have two strings to his bow. The real essence of the matter was, I think, as outlined in my judgment. I do not think that the new evidence in the result modifies the decision arrived at. I prefer the evidence given before a mark at which to aim had been made clearly apparent.

The plaintiff company appealed from the judgment of MIDDLETON, J.

January 21, 1915. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, J.J.A.

F. Arnoldi, K.C., and *W. A. Proudfoot*, for the appellant company, argued that the defendant was bound to see that the moneys for the premiums had been actually paid to the insurance companies. The set-off of accounts between the defendant and the Insurance Brokerage and Contracting Company, his sub-agents, was not a payment of the premiums either as regarded the insurance company or the insured: *Acey v. Fernie* (1840), 7 M. & W. 151; *Frazer v. Gore District Mutual Fire Insurance Co.* (1882), 2 O.R. 416; *London and Lancashire Life Assurance Co. v. Fleming*, [1897] A.C. 499. Payment to an agent of an insurance company by set-off, even with the assent of the agent, was not payment to the company. So far as the appellant company was concerned, the defendant must be regarded as its agent, without authority to appoint other agents for the appellant: *Canadian Fire Insurance Co. v. Robinson* (1901), 31 S.C.R. 488; *Western Assurance Co. v. Provincial Insurance Co.* (1880), 5 A.R. 190. The respondent was liable for neglect to obtain proper and binding insurance, and this was especially so in the case of the Security Mutual Fire Insurance Company: *Rudd Paper Box Co. v. Rice* (1912), 3 O.W.N. 534, 20 O.W.R. 979; *Baxter & Co. v. Jones* (1903), 6 O.L.R. 360.

C. A. Moss, for the defendant, respondent, relied upon the

judgment below. The assent of the insurance companies to the set-off dispensed with the necessity of the agent handing the amount of the premiums over and receiving it back again. The respondent had not been guilty of any default. The policies were valid, and the plaintiff had not been prevented, by anything which the defendant did or failed to do, from realising on them. The respondent was not required to warrant that the insurance companies would not dispute liability. The respondent's duty was fulfilled when he had succeeded in buying the insurance through the Insurance Brokerage and Contracting Company, and had handed over the policies to the appellant.

Arnoldi, in reply.

March 15. MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment, dated the 22nd September, 1914, which was directed to be entered by Middleton, J., after the trial of the action before him, sitting without a jury, at Toronto, on the 11th and 12th March and 14th September, 1914.

The action is brought to recover damages for the failure of the respondent, who is an insurance agent and broker, to perform his undertaking to place and obtain good and valid policies of insurance upon the appellant's "stock of merchandise, furniture, machines, tools, implements, etc.," against loss by fire to the extent of \$3,600, and it is alleged by the appellant that the policies of insurance which the respondent obtained were, in the case of four of the five companies by which they purported to be issued, never good and valid policies, because the premiums were never paid, and there was no liability under the policies to make good the appellant's loss.

The respondent resists the claim of the appellant, upon the ground that he obtained the required insurance through the Insurance Brokerage and Contracting Company Limited, through whom, as the appellant knew, he had obtained for it other insurances earlier in the year; that in his dealings with the brokerage company he paid to it the premiums on these insurances, and that the premiums were paid to the insuring companies, or that they gave credit for them to the brokerage com-

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pany or to their agents; that the policies were good and valid policies; and that, having obtained and delivered them to the appellant, "he fulfilled all duties which were cast upon him in connection with the matters complained of in this action."

Agreeing as I do with the findings of fact of the learned trial Judge, except in the case of the North American Mutual Fire Insurance Company, it is proper that I should state why, while agreeing with him in the case of the other companies, I differ from him in the case of that company.

That the respondent was employed by the appellant to effect the insurances and that he was paid the amount of the premiums in respect of the five policies which he obtained, is not open to question, nor is it open to question that the appellant knew that the insurances could be placed only with companies that were not licensed to do business in Ontario.

The respondent, as I have said, was an insurance agent and broker, and what he did in carrying out his mandate was to employ the Insurance Brokerage and Contracting Company Limited, the finances of which he controlled, and in which he and Charles E. Ring and one Carroll were interested, and of which Ring was the manager, to effect the insurances.

At the time the control of the brokerage company was obtained, Ring was carrying on, under the name of C. E. Ring & Co., the business of an insurance agent and broker, and he testified that he was agent of all the companies with which the insurances were placed, except the Security Mutual Fire Insurance Company. It was, as I understand the evidence, part of the arrangement between the respondent, Ring, and Carroll, that Ring should continue to carry on the business he had been carrying on in the name under which it had been carried on, but whether the profits were to be his, or were to belong to the brokerage company is not shewn.

The respondent, under the arrangement between him, Ring, and Carroll, made cash advances to the brokerage company, and the company was, always largely indebted to him for these advances. The company kept what was called a trade account with the respondent, in which he was from time to time credited

with the premiums for insurances he had effected which were received by the company, and he was debited with premiums which he had received on insurances he had employed the company to effect for him.

The money which the respondent received from the appellant in payment of the premiums in respect of the policies in question was not paid by the respondent to the brokerage company or to Ring or to the insuring companies; but the respondent credited to the brokerage company, in an account which he kept with it in his books, the amount of the premiums, and the company in its books debited it to the respondent in the trade account which the company kept with him; Ring also debited the brokerage company in his books with the amount of the premiums; and each of the companies, except the Security Mutual Fire Insurance Company, debited the amount of its premium in its books either to Ring or to C. E. Ring & Co.

Ring was entrusted by the National Protector Insurance Company and by the North American Mutual Fire Insurance Company with blank policies, duly executed by them, which he had authority to fill up and to deliver to persons who applied for insurances with them, subject perhaps in the case of the latter company to the application being accepted by it; and the policies of these companies which are in question were so filled up and delivered by Ring to the brokerage company.

The policy of the Colonial Assurance Company was issued by the company at its head office in Winnipeg, sent to Ring, and by him delivered to the brokerage company.

The policy of the Security Mutual Fire Insurance Company was procured by Ring through brokers in New York, named Woodcock & Co.; W. L. Pettibone & Co., of Newark, N.J., were the agents of the company at that place, and the policy was countersigned by them and delivered to Woodcock & Co., who sent it on to Ring, and it was delivered by Ring to the brokerage company.

None of these companies had any knowledge of the dealings between the respondent and the brokerage company, or between that company and Ring.

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In the case of the Security company, the premium was charged by it to Pettibone & Co., and in the case of the three other companies the premiums were charged by them to C. E. Ring & Co. What the course of dealing between Pettibone & Co. and Woodcock & Co. was, does not appear beyond the mere statement of the fact that Woodcock & Co. acted as brokers in procuring the insurance from the Security company.

The course of dealing between Ring and the Colonial company was that he was allowed sixty days after the close of the month in which a policy was written in which to pay the premium; and, according to the testimony of Mr. Dick, the secretary-treasurer and manager of the company, "the matter of the payment of the premiums by the insured is left with the agent," and "he is responsible to the company for these premiums." Mr. Dick also testified that the premium on the policy of his company; which is in question, was paid by Ring to the company, "but later he said it was not paid to them" (*i.e.*, to C. E. Ring & Co.), "and that whether or not the premium was paid to the agent is a matter which is left between the agent and the assured."

In the case of all the four companies having been told by Ring that the premiums had not been paid to him, the companies assumed to cancel their policies on the ground that the premiums had not been paid to Ring. The only notice of the cancellation proved to have been received by the appellant from the Security company was sent by registered post from Newark on the 10th May, 1912, and was received by the appellant on the 17th of that month. The notice of cancellation of the Colonial policy was given by Ring on the 25th May, 1912, under instructions from the company.

In the case of the National Protector Company, the notice of the cancellation was given on the same day by Ring, purporting to act for the company, but he does not appear to have had any instructions from the company to give it.

The North American company did not give any notice of cancellation; but, after proofs of loss were sent to it, denied liability, on the ground that the premium was never paid to it, and that it was, as the company understood, never paid to the

appellant's "brokers, C. E. Ring & Co.," and on the further ground that it was not liable because of the appellant's default in paying an assessment made on the company's policy-holders, which, according to the terms of the policy, rendered it void.

The proper conclusion upon the evidence is, I think, that each of the companies looked to its agent as its debtor for the amount of these premiums, and not to the insured, and that it was only when the premiums had not in fact been paid to the agent that he was entitled to have the amount of them credited to him.

I agree with the finding of my brother Middleton that, as between Ring & Co. and the appellant, the premiums had been paid in all of the four cases; and it follows that the payment by Ring to the companies by which he was charged with the premiums was an absolute payment discharging the appellant from liability to pay them, unless the decided cases require us to hold that the transactions between these companies and Ring & Co. were "*res inter alios*" and cannot be taken advantage of by the appellant.

In the case of the Security company, the premium was never received by Pettibone & Co.; and therefore, when that fact became known to the company, that firm was entitled to be credited with the amount of the premium which been charged to it, and the premium was therefore never paid to the company, and it had the right for that reason to repudiate liability on the policy.

Not only was this the case, but Ring did not pay the premium to Woodcock & Co., nor did Woodcock & Co. pay it to Pettibone & Co.

Except in the case of the Security company policy, it is clear, I think, that no question would ever have arisen as to the non-payment of the premiums but for the intervention of Ring, and it was entirely owing to it that the companies took the position that the premiums were not paid, and assumed on that ground to cancel their policies. The policies had been on foot for several months before Ring intervened, and during that time all parties treated them as valid and subsisting, and it was not for the purpose of protecting the companies that

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Ring intervened, but he did so for some purpose of his own after he had quarrelled with the respondent.

The strongest case against the appellant's right to recover on the policies is *London and Lancashire Life Assurance Co. v. Fleming*, [1897] A.C. 499, but that case is, I think, distinguishable. There the premiums were settled by promissory notes, which were not paid at maturity, and the only authority which the agent who took the notes had to bind the company was to accept the notes on the condition that, if they were not paid at maturity, the policy or official receipt should be null and void. The company did not know that the notes had been taken, but, upon receipt of the applications for the insurances, it debited the agent with the amount of the premiums and the policies which were issued and delivered provided as follows: (1) Policies shall not be in force until the first premium is paid. (10) If a note or other obligation be taken for the first or renewal premium, or any part thereof, and such note or other obligation be not paid when due, the policy or assurance becomes null and void at and from default. The agent sent his own note for the premiums to the company, and the company acknowledged the receipt of it, and said it would hold the note as requested. The main argument for the plaintiff was, that the notes had been given to the agent for the purpose of his raising, by discounting them, the money required to pay the premiums, and that, he having discounted the notes and received the proceeds of them, the premiums were paid in cash, although the agent had applied the proceeds to his own use. This argument did not prevail, because, in the view of the Judicial Committee, that was not proved. Dealing with the argument of counsel for the plaintiff that the company had accepted the agent's note and accepted him as its debtor, Sir Henry Strong, in stating the opinion of the Judicial Committee, said there were many answers to it, but that it would suffice to refer to two. "In the first place," he said, "how, without an entire disregard of legal principle, could it possibly be held that the appellants must be deemed to have entered into entirely new contracts of assurance of the life of James Fleming, and to have accepted their own agent's note in payment of the premium,

when they were in entire ignorance of all that had passed between White'' (i.e., the agent) ''and Fleming, and were entirely unaware of the relations in which they stood to the assured? This, like the other point relied upon, was clearly a matter to be proved by the respondent; and it is a sufficient answer to say that there is not only not a shadow of proof in its support, but strong evidence the other way. Further the principle upon which . . . *Accey v. Fernie*, 7 M. & W. 151, proceeded applies. The dealings between the appellants and their agent were as regards the assured *res inter alios*, and afford no presumption of an intention to treat the agent as acting, not for his true principals, but as the representative of the assured.''

What Sir Henry Strong referred to as ''strong evidence the other way'' was the testimony of the agent, who said: ''Where I had given time on premiums, and the cash had not been paid to me, and I had not the cash to pay myself, I gave a note myself as evidence that there was something due them, not as payment of the premium.''

I do not understand that what is said with reference to the application of the principle of *Accey v. Fernie* means more than that the mere fact of the company having taken the agent's note for the premiums, in the circumstances of that case, afforded no presumption of the nature which Sir Henry Strong mentioned. I do not understand him to mean that the fact that an agent has given credit for a premium, and has treated himself and has been treated by the insurers as their debtor in respect of it, if proved, is not sufficient to warrant the conclusion that the premium has been paid to the insurers and the contract of assurance has become effective. To hold that it is not, would, I venture to think, come as a surprise to insurance agents and the business community; for I also venture to think that in many cases it is the course of dealing of agents to treat the insured as their debtor for the premium, and themselves as the debtors in respect of it to the insurers whom they represent, and that this practice is well known to and recognised and acted on by insurers.

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However that may be, the liability of the companies in this case does not depend upon presumptions afforded by the course of dealing between them and their agents. But the facts in evidence warrant the conclusion that it is proved that the intention of all the parties was that Ring, and he alone, should be liable to the companies for the premiums, and that he should look to the insured, or those at whose instance he had placed the insurances, for payment to him of the premiums; subject only to the condition that, if Ring should be unable to obtain payment of the premium, the debit to him should be cancelled.

If this was the true nature of the transactions, and the conclusion having been come to, as I have already stated, that as between the appellant and Ring the premiums had been paid to Ring, they were as between the companies and the appellant also paid.

If this view is right, the notices of cancellation given by the companies, if otherwise sufficient, were insufficient to put an end to their contracts, because there was neither return nor offer to return the unearned premiums that had been paid.

In the case of the Security company, I am unable, for the reasons I have already mentioned, to come to the conclusion that the premium was paid to that company; and I am of opinion that the respondent is liable to the appellant to make good the loss which the appellant has sustained, owing to the respondent not having obtained a binding contract from that company.

It was argued by Mr. Moss that all the respondent was required to do was to "buy insurance" to the required amount, and that, having employed the brokerage company to obtain it, and having received the policies from that company duly executed, and having delivered them to the appellant, his whole duty was performed; but I am not of that opinion. What the respondent undertook to do was to procure binding contracts of insurance, and to do all that was necessary on his part to procure them, which involved the payment of the premiums; and, having failed in that duty, in respect to the insurance with the Security company, he is, in my opinion, liable to the appellant for the loss occasioned thereby.

It may be unfortunate for the appellant that the question of the liability of the companies whose policies are, in my opinion, binding on them, has not been determined as between them and the appellant; for it may be that, if he proceeds against them, a different state of facts may be developed in the actions against them, and the result may be that they will escape liability, because on those facts the conclusion cannot be properly drawn that the premiums were paid to them.

Upon the whole, I am of opinion that the appeal should be allowed, and that there should be substituted for the judgment dismissing the action, judgment for the appellant for the amount for which the Security Mutual Fire Insurance Company would have been liable upon its policy for \$1,000, with interest from the date from which interest would have run against the company; the amount of principal and interest to be settled by the Registrar if the parties are unable to agree as to it.

The appellant should have the costs of the action, except as to the issue on which it has failed, and the respondent should have his costs of these issues, and there should be no costs of the appeal to either party.

MACLAREN and HODGINS, J.J.A., concurred.

MAGEE, J.A., agreed in the result.

Appeal allowed in part.

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Vendor and Purchaser—Agreement for Sale of Land—Rescission—Purchaser's Damages—Costs of Investigating Title—Loss of Bargain—Vendor's Damages—Removal of Buildings by Purchaser—Inability to Make Restitutio in Integrum—Provisions of Contract—Consent to Alteration of Property—Measure of Damages—Profit from Buildings.

The order of MIDDLETON, J., *ante* 78, was reversed as to the defendant's damages and affirmed as to the plaintiffs' damages.

The judgment pronounced by the Appellate Division, upon appeal from the judgment at the trial, 31 O.L.R. 365, did not involve *restitutio in integrum* or its equivalent. Inability to make such restitution is a bar only as against the party by whose acts the property has been changed or depreciated. The buildings upon the land which was the subject of the

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contract of sale were removed by the plaintiffs, the purchasers, in pursuance of the terms of the contract, in good faith, and before notice of the fact that trouble was likely to arise from the prior agreement affecting the land; and the alteration was, therefore, something consented to by both parties. The proper measure of the defendant's damages was, therefore, the amount received by the plaintiffs from the sale and salvage of the buildings over and above the cost of removal—not the value of the buildings.

APPEAL by the plaintiffs from the order of MIDDLETON, J., ante 78, allowing the appeal of the defendant from the report of the Local Master at Hamilton, and dismissing the plaintiffs' appeal from the same report.

February 19. The appeal was heard by MEREDITH, C.J.O., MAGEE and HODGINS, JJ.A., and LENNOX, J.

I. F. Hellmuth, K.C., and *W. S. MacBrayne*, for the appellants, on the first branch of the appeal, contended that the damages recoverable by the respondent should be limited to what was actually received for the buildings, and should not be extended so as to allow him damages by way of compensation for their loss. They referred to *Bolton v. London School Board* (1878), 7 Ch. D. 766; *Liggins v. Inge* (1831), 7 Bing. 682; *Williams on Vendor and Purchaser*, 2nd ed., p. 1065. Upon the second branch of the appeal, as to the damages claimed by the appellants and disallowed by the Master and MIDDLETON, J., counsel argued that they were properly recoverable.

THE COURT, without calling on counsel for the respondent, dismissed the appeal upon this branch.

G. Lynch-Staunton, K.C., and *S. F. Washington*, K.C., for the defendant, respondent, upon the first branch of the appeal, argued that the damages to be recovered by their client in respect of the buildings should be measured in accordance with the views of the learned Judge below, and referred to *Addison v. Ottawa Auto and Taxi Co.* (1913), 30 O.L.R. 51; *Walker v. Moore* (1829), 10 B. & C. 416; *Kitchen v. Murray* (1865), 16 U.C.C.P. 69; *Fry on Specific Performance*, 5th ed., p. 368, para. 744.

Hellmuth, in reply.

March 15. The judgment of the Court was delivered by HODGINS, J.A.:—Appeal from the judgment of Middleton, J.,

varying the Master's report by allowing \$2,000, the value of buildings destroyed and removed by the plaintiffs. As to another branch, the appeal was dismissed on the argument, and judgment was reserved upon the plaintiffs' main appeal.

The learned Judge's view now is that the judgment pronounced by the Appellate Division, and reported in 31 O.L.R. 365, necessarily involved *restitutio in integrum* or its equivalent. Hence he allows \$2,000, the value of the respondent's buildings as they stood when the contract was entered into, rather than \$75, the amount received by the appellants from the sale of the salvage from the buildings over and above the cost of removal.

This, however, is not the case. No claim was made by the respondent that the appellants were not entitled to rescission because they had removed the buildings, or that, if granted, they must fully compensate the respondent for the value of the buildings removed. It is hardly likely that the experienced counsel who then acted for the respondent would have overlooked that point, especially as it would have answered a double purpose, namely, as shewing, if unexplained, an acceptance of the title (*Margravine of Anspach v. Noel* (1816), 1 Madd. 310; *Commercial Bank v. McConnell* (1859), 7 Gr. 323; *Wallace v. Hesslein* (1898), 29 S.C.R. 171); and as affording a practical bar to rescission, unless full restitution could be made.

However that may be, the point was not argued before the Court, and its judgment did not rest upon that view of the respondent's rights.

The contract itself probably affords the explanation. It provided that possession might be taken at once, and leave was given to the appellants to take possession at once and "to cut down trees, remove fences, clear off all obstacles necessary to put property in good saleable condition, survey and open up streets through said property, sell or build on said property."

From the evidence taken before the Master, it appears that the buildings were removed when both parties were under the impression (which apparently the respondent and the learned

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Judge below still retain) that the respondent had a good title, and before knowledge that a claim under the Bell agreement was being actively asserted. What was done was, therefore, not only in pursuance of the terms of the contract, but in good faith and before notice, not of course of the existence of the Bell agreement, but of the fact that trouble was likely to arise therefrom. Inability to make *restitutio in integrum* is held to be a bar only as against the party by whose acts the property has been changed or depreciated: *Phosphate Sewage Co. v. Hartmont* (1877), 5 Ch.D. 394; *Rees v. De Bernardy*, [1896] 2 Ch. 437, 446. I have found no case where it forms a defence when the alteration has been made pursuant to the contract, and therefore is something consented to by both parties.

In *Head v. Tattersall* (1871), L.R. 7 Ex. 7, it was decided that, while the buyer of a horse, which, by the contract, he could return if it did not answer the description, must return it in the same state in which it was bought, that right was subject to any of those incidents to which the horse might be liable, (1) either from its inherent nature, or (2) in the course of the exercise by the buyer of those rights over it which the contract gave.

The vendor is bound to hold the property for the purchaser after the contract is entered into: *Clarke v. Ramuz*, [1891] 2 Q.B. 456. Neither he, nor the purchaser, if let into possession by contract, can change it, but they may agree to any modification of their strict rights. If, where the vendor is asserting a good title, and, pending completion, he and the purchaser are willing that the latter should begin to make improvements, or deal with it so as to make it different from what it originally was, the reason for the rule does not seem applicable. If the contract goes off, the purchaser may lose his expenditure (*Rankin v. Sterling* (1902), 3 O.L.R. 646); but the vendor certainly cannot complain if he gets the property back, together with any benefit which in its altered condition has come to the purchaser as the result of the agreement or pursuant to the terms of the contract. See *Addison v. Ottawa Auto and Taxi Co.*, 30 O.L.R. 51.

The reference as to damage, if legally recoverable, was

confined to what was claimed in the pleadings, namely, loss and damage caused by reason of the appellants not carrying out the contract, and because the respondent had been unable to meet obligations contracted in expectation of receiving the purchase-price for the property; but the reference has been proceeded with under the idea that the value of the buildings was a possible element of damage. That, however, must be assessed under the real circumstances of the case, and not upon the view that the appellants had improperly altered the condition of the property, which is contrary to the fact.

Hence the allowance of the \$75, being the profit made by the appellants, was the proper measure of damages, and is that which must have been in the contemplation of the parties, having regard to their contract.

The appeal should, therefore, be allowed with costs, and the damages reduced to \$75. There should be no costs in the Master's office nor in the Court below to either party, as in the result success has been divided throughout.

It may be proper to observe that the respondent admits that at the former trial he said that the demolition of these buildings was in pursuance of the agreement, though he now indicates that he so answered without going fully into it. Speaking of the plans used by the appellants when applying to the council to get consent to the proposed streets upon the property in question, the respondent, in answer to the question, "If either of these plans were adopted for the sale of this property, it would be necessary to remove the buildings that you have mentioned?" says, "If any one chose the one method instead of the other, they would have to move the buildings to carry the other one out;" and when further pressed upon the same point he adds, "Yes, according to either of those plans, yes." Schultz, who confirms this, says that a rough sketch-plan made by the respondent would involve the same result, though the respondent is not willing to admit this.

Appeal allowed in part.

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[APPELLATE DIVISION.]

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REX v. COHEN.

Criminal Law—Director of Company—False Statement Made to Bank—Criminal Code, sec. 414—Statement as to Director's own Affairs—Responsibility as Guarantor—"Prospectus"—Obtaining Credit by False Pretences—Criminal Code, sec. 405A.

The defendant, being a director of an incorporated commercial company, and being offered by the company as surety for a proposed loan from a bank, gave a personal guaranty to the bank on behalf of the company, and also a statement of his own affairs which, to his knowledge, was untrue:—

Held (MAGEE, J.A., dissenting), that this did not constitute the offence mentioned in sec. 414 of the Criminal Code: that section deals with a prospectus, statement, or account made, circulated, or published by a promoter, director, public officer, or manager, in that capacity, and does not apply to a statement such as made by the defendant, which related to his own financial standing, and had no relation to the company of which he was director or to its business or affairs or to its assets or liabilities. Remarks on the history of sec. 414 and the effect of the introduction of the word "prospectus."

But held (HODGINS, J.A., dissenting), that there was evidence for the jury of an offence against sec. 405A. of the Criminal Code: in enacting that section Parliament had in view, not only the contracting of a debt, but the incurring of a liability; and the defendant incurred a liability on his guaranty to the bank, and, in incurring it, obtained credit, within the meaning of the section, on the faith of the statement which he made as to his financial position.

Regina v. Boyd (1896), 4 Can. Crim. Cas. 219, *Regina v. Bryant* (1899), 63 J.P. 376, *Regina v. Jones* (1898), 19 Cox C.C. 87, and *Rex v. Campbell* (1912), 5 D.L.R. 370, 19 Can. Crim. Cas. 407, considered.

CASE stated by one of the Junior Judges of the County Court of the County of York, presiding at the General Sessions for that county.

The defendant was tried at the Sessions upon two indictments.

The first was that he, "being a director of the National Matzo and Biscuit Company Limited, did make, circulate, or publish, or did concur in making, circulating, or publishing, statements or accounts which he knew to be false in a material particular, with intent to deceive or defraud the Northern Crown Bank to entrust or advance property, to wit, a large sum of money, to such National Matzo and Biscuit Company Limited, contrary to the Criminal Code."

The second indictment contained three counts. By the first

count, the defendant was charged, under sec. 405 of the Criminal Code, with having in February, 1909, knowingly and fraudulently, by false pretences, obtained from the Northern Crown Bank \$5,000 with intent to defraud the said bank. By the second count, it was charged that the defendant, "in incurring a debt or liability to the Northern Crown Bank, did obtain credit under false pretences from the said bank. And, by the third count, the defendant was charged, under sec. 405 of the Code, with having, knowingly and fraudulently, by false pretences, procured the said bank to pay and deliver to the National Matzo Company various sums of money aggregating \$5,000.

The Judge presiding at the Sessions, at the close of the case for the Crown, directed the jury to acquit the defendant upon both indictments; and, at the request of the Crown, reserved for the Court the question: "Was there any evidence upon which the jury could find the accused guilty on either of the indictments or any of the counts thereof?"

December 9, 1914. The case was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, J.J.A.

J. R. Cartwright, K.C., for the Crown, stated that, in his opinion, the acquittal on the first indictment, laid under sec. 414 of the Criminal Code, was right. As regards the second indictment, he did not rely on the first count, but he did rely on the second, which was laid under sec. 405A.: see *Rex v. Campbell* (1912), 5 D.L.R. 370. As to the third count, which came under the concluding words of sec. 405, he referred to *Regina v. Eagleton* (1854-55), Dears. C.C. 376, 515, 6 Cox C.C. 559. The defendant will rely on *Regina v. Boyd* (1896), 4 Can. Crim. Cas. 219; but that case is distinguishable, as there nothing was done except to get the credit, while here the money was actually obtained.

T. C. Robinette, K.C., for the defendant, referred to Crankshaw's Criminal Code of Canada, 3rd ed., p. 460, and cases there cited, especially *Rex v. Wavell* (1829), 1 Moody C.C. 224; the *Boyd* case, *supra*; *Regina v. Crosby* (1843), 1 Cox C.C. 10; *Regina v. Bryant* (1899), 63 J.P. 376.

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March 15, 1915. MACLAREN, J.A.:—This is a case reserved by the Junior County Court Judge of York, on the application of the Crown.

The accused was tried at the General Sessions on two indictments. At the close of the case for the Crown the Judge directed the jury to acquit in each case, on the ground that there was no evidence of the offences charged, and reserved for this Court the following question: "Was there any evidence upon which a jury could find the accused guilty on either of the indictments or any of the counts thereof?"

The first indictment charged that the accused, "being a director of the National Matzo and Biscuit Company Limited, did make, circulate, or publish, or did concur in making, circulating, or publishing, statements or accounts which he knew to be false in a material particular, with intent to deceive or defraud the Northern Crown Bank to entrust or advance property, to wit, a large sum of money, to such National Matzo and Biscuit Company Limited, contrary to the Criminal Code."

Section 414 of the Criminal Code, under which this indictment is laid, reads as follows: "Every one is guilty of an indictable offence and liable to five years' imprisonment who, being a promoter, director, public officer or manager of any body corporate or public company, either existing or intended to be formed, makes, circulates, or publishes, or concurs in making, circulating or publishing any prospectus, statement or account which he knows to be false in any material particular, with intent to induce persons, whether ascertained or not, to become shareholders or partners, or with intent to deceive or defraud the members, shareholders or creditors, or any of them, whether ascertained or not, of such body corporate or public company, or with intent to induce any person to entrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof."

This section of the Code was based upon sec. 85 of the Canadian Larceny Act of 1869 (32 & 33 Vict. ch. 21), which was substantially copied from the Imperial Larceny Act 24 & 25 Vict. ch. 96, sec. 84; which latter embodied sec. 8 of the Act 20 & 21

Vict. ch. 54. The only new matter in the Code was the insertion of the words "promoter" and "prospectus."

The evidence shewed that the accused had given a guaranty to the bank to the extent of \$10,000; also that he gave a statement of his own affairs to the bank which, to his knowledge, was untrue, as it omitted a liability of his to one Simon Cohen. The Judge held that sec. 414 applied only to statements of the affairs of the company, and directed the jury to acquit.

There is no doubt that the introduction of the word "prospectus" in sec. 414 has a tendency to strengthen the impression that the "statement of account" in the section has reference to the affairs of the company, and not to the personal affairs of the officer making the same, and to suggest that the maxim *noscitur a sociis* might possibly be applicable.

I have not been able to find a single reported case either in England or Canada where the prosecution was based upon a statement of the personal affairs of the officer accused, notwithstanding that this law has been in force in these countries for a period of 57 and 45 years respectively.

In the circumstances, there is, in my opinion, sufficient doubt as to the proper interpretation of the section to require us to give a negative answer to the question reserved for us by the trial Judge as to this indictment, inasmuch as the law ought to be clear to justify a conviction, and "the Court must see that the thing charged as an offence is within the plain meaning of the words used:" *Dyke v. Elliott* (1872), L.R. 4 P.C. 184, at p. 191.

Usually a reserved case is asked for by the Crown in case of an acquittal in order to settle the law for the future. This is not necessary in the present case, as Parliament has, by sec. 16 of ch. 13 of the statutes of 1913, 3 & 4 Geo. V., added a new section, 407A., to the Criminal Code, expressly providing for a case like the present. That section, however, is not applicable to the present case, as it was passed only on the 6th June, 1913, and the statement now complained of was made in February, 1909.

The second indictment referred to in the reserved case contained three counts. The first count charged the accused, under

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sec. 405 of the Code, with having in February, 1909, knowingly and fraudulently, by false pretences, obtained from the Northern Crown Bank \$5,000 with intent to defraud the said bank.

The third count charged the accused, under sec. 405, with having knowingly and fraudulently, by false pretences, procured the said bank to pay and deliver to the National Matzo Company Limited various sums of money aggregating \$5,000.

The County Crown Attorney, who represented the Crown at the General Sessions, informed the presiding Judge that as to these charges, which were laid under sec. 405 of the Code, the Crown would offer no evidence; and counsel for the Crown before us did not press for an affirmative answer as to these two counts.

The second count of the indictment charged that the accused, "in incurring a debt or liability to the Northern Crown Bank, did obtain credit under false pretences from the said bank." This count was laid under sec. 405A., which was added to the Code by sec. 6 of ch. 18 of the statutes of 1908, 7 & 8 Edw. VII., and which reads as follows: "Every one is guilty of an indictable offence and liable to one year's imprisonment who, in incurring any debt or liability, obtains credit under false pretences, or by means of any fraud."

This section was introduced to overcome the defect in our law pointed out by the Quebec Court of Appeal in *Regina v. Boyd*, 4 Can. Crim. Cas. 219, viz., that sec. 405 applied only to the obtaining by false pretences of something capable of being stolen, and not to the obtaining of credit. The new section 405A., above quoted, was copied from the Imperial Debtors Act, 1869, 32 & 33 Vict. ch. 62, sec. 13 (1), which was considered in the case of *Regina v. Bryant*, 63 J.P. 376, and it was held by the Common Serjeant that the Act did not apply where credit was given to some person other than the party making the application for it.

The facts of the present case are, however, different. The accused in fact incurred a liability for himself, if not a debt, and obtained a credit for himself on his guaranty, although the money was actually paid to the company of which he was a director and shareholder; and he benefited by it.

This section was considered by the Quebec Court of Appeal in *Rex v. Campbell*, 5 D.L.R. 370, and it was there unanimously held to be applicable to a case where the president of a company had fraudulently obtained credit for the company.

I am of opinion that the question as to this count should be answered in the affirmative.

Upon the whole, I am of opinion that our answer to the question reserved should be in the negative as regards the first indictment and the first and third counts of the second indictment; and in the affirmative as regards the second count in the second indictment.

GARROW, J.A.:—I agree.

MEREDITH, C.J.O.:—I agree with the opinion of my brother Maclaren that there was evidence for the jury of an offence against sec. 405A. of the Criminal Code.

In enacting the section, Parliament had in view, not only the contracting of a debt, but the incurring of a liability; and the accused certainly incurred a liability on his guaranty to the bank, and, I think, in incurring it, obtained credit, within the meaning of the section, on the faith of the statement which he made as to his financial position.

“The credit of an individual is the trust reposed in him by those who deal with him that he is of ability to meet his engagements:” Abbott’s Law Dictionary, p. 321; and, as was said by Gardiner, J., in *Drydock Bank v. American Life Insurance and Trust Co.* (1850), 3 N.Y. (Comstock’s Reports) 344, 356, “credit is the ‘capacity of being trusted.’” See also *Mumford v. American Life Insurance and Trust Co.* (1851), 4 N.Y. (Comstock’s Reports) 463, 472.

The inducing by false pretences the bank to accept the guaranty of the accused, and on the faith of it to agree to make advances to the company, was as much within the mischief against which the section is directed as if, by means of false pretences, the accused had himself obtained advances from the bank on his promissory note.

It is unnecessary to express any opinion as to whether, if

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there had been no guaranty by the accused, but only the statement which he made, by which the bank had been induced to give credit to the company, the accused would have come within the section. The representation, no doubt, induced the bank to give credit to the company, but that was not all; it also induced the bank to give credit to the accused on his guaranty.

I am unable to say that the learned Junior Judge erred in ruling that there was no case for the jury on the first indictment. When the history of sec. 414, which my brother MacLaren mentions, is considered, it is reasonably clear, I think, that what the accused did, did not constitute the offence mentioned in the section. The Imperial Act 20 & 21 Vict. ch. 54 is intituled "An Act to make better Provision for the Punishment of Frauds committed by Trustees, Bankers, and other Persons intrusted with Property," and it contains the following preamble: "Whereas it is expedient to make better provision for the punishment of fraud committed by trustees, bankers, and other persons intrusted with property."

The Imperial Act 24 & 25 Vict. ch. 96 was "An Act to consolidate and amend the Statute Law of England and Ireland relating to Larceny and other similar Offences," and the provisions of the earlier Act are found in it in a group of sections headed, "As to Frauds by Agents, Bankers, or Factors."

When the provisions of sec. 8 of the earlier and sec. 84 of the later of these Imperial Acts were embodied in legislation of the Parliament of Canada, by 32 & 33 Vict. ch. 21, which was intituled "An Act respecting Larceny and other similar Offences," they formed part of a group of sections headed "As to frauds by agents, bankers, or factors."

In the Revised Statutes of Canada, 1886, these provisions were re-enacted in the Larceny Act (ch. 164), which is intituled "An Act respecting Larceny and similar Offences," and they form part of a group of sections headed, "Frauds by Agents, Bankers or Factors." These sections were re-enacted by the Criminal Code, 1892 (55 & 56 Vict. ch. 29), where they appear as part of a group of sections headed "Fraud," and for the first time the word "prospectus" appears in sec. 365, which is now sec. 414 of R.S.C. 1906, ch. 146, and is one of a group of

sections headed "Fraud and Fraudulent Dealing with Property."

In view of the history of sec. 414, and having regard to the introduction of the word "prospectus," I am of opinion that what the section deals with is a prospectus, statement, or account made, circulated, or published by a promoter, director, public officer, or manager, in that capacity, and that it does not apply to a statement such as was made by the accused, which related to his own financial standing, and had no relation to the company of which he was director or to its business or affairs or to its assets or liabilities.

MAGEE, J.A.:—In coming to the conclusion that, because the false statement made by the accused was in a statement of his own affairs and not of the affairs of the National Matzo and Biscuit Company Limited, of which he was a director, it did not come within sec. 414 of the Criminal Code, and in so directing the jury, the learned Chairman of the General Sessions, in my opinion, took too narrow a view both of the statement itself and of that enactment.

It is true that the false statement related to his own affairs; but, inasmuch as the company was offering him as a guarantor to the bank for the increased advances which the company was asking from the bank, and the statement was made by him to induce the bank to accept him as a guarantor and make the advances to the company, the statement became material to the company's transaction, and was a statement of assets and liabilities of the company's proposed security, and not merely those of a person unconnected with the company. If the company had offered to procure some outside person to give his personal security or security upon his property for the desired advance to the company, and the president or manager had concurred with such outsider in making a wilfully false statement of the assets or specific property of the latter for the purpose of deceiving the bank and inducing it to make the advance to the company, I am wholly unable to see why such statement by the president or manager would not be a statement under this sec. 414, even in the narrow sense of the word "statement"

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as a compilation of figures, and not an allegation of fact. Nor does it appear to me to be less a statement within the section because the proposed surety is not an outsider but is the very person who as an official of the company and for its purposes presents the false statement of his own affairs.

As regards sec. 414, it cannot, I think, be limited to statements of the affairs or property of the company itself only. It expressly applies, not only to existing companies, but also to those intended to be formed, and not only to directors and officers, but also to promoters, and not only to statements or accounts, but also to a prospectus. There may, therefore, be a breach of the section though no company be in existence with regard to which any statement is or can be made. The section is aimed at false statements made by persons connected with companies who are acting for the companies, and not nominally or directly for themselves. To be brought within it, the important things are that the accused shall be a promoter, director, or officer, that he shall make, circulate, or publish the statement, that he shall do so with intent to induce some person to advance property to or become a shareholder or creditor of the company, and that the statement shall be known by the accused to be false, and that it shall be so in a material particular. This last requirement of materiality contains the gist of the section, so far as the present case is concerned. It requires that the statement shall be connected with the company's transaction and be of weight in it. If it is, and is falsely and knowingly made by a director, with the necessary intent, it appears to me to come clearly within the section. Take the not infrequent case of a mining company making a statement of the product of mines upon adjoining property not owned by it, or a company offering its bonds to be secured by some other company, whose financial position it states. If such statements are wilfully false, why do they not come within the spirit and the wording of the section in question, even as it originally stood in R.S.C. 1886, ch. 164, sec. 69, which did not expressly refer to a prospectus or a promoter or companies to be formed, but did apply to "any written statement or account." But, even if they would not have been within that section, 69, I am unable to agree that the

present sec. 414, or its original, sec. 365 of the Criminal Code of 1892, should be limited by the wording of sec. 69 of 1886. The section was recast in 1892; and, while "members" were omitted, the broad intent of the Legislature was sufficiently indicated in the new language adopted.

As to the second count in the other indictment, which is laid under sec. 405A., I agree with my Lord the Chief Justice and my brother Maclaren that there was evidence that in incurring a liability the accused obtained credit within the meaning of that section. The case of *Regina v. Bryant*, 63 J.P. 376, cited for the accused is readily distinguishable. There the prisoner had falsely used the names of other persons, and the question was whether credit was given to them or to him. Here, if credit was given to the surety who was allowed to incur the liability, there is no question to whom that credit was given.

As to the counts in respect of which counsel for the Crown at the trial announced that no evidence would be offered, it would be obviously improper now to deal further with them, although the case stated makes no exception of any count.

I would, therefore, answer the learned Chairman's question in the affirmative as to the counts under secs. 414 and 405A., and in the negative as to the others.

HODGINS, J.A.:—I am in agreement with the judgment of my brother Maclaren, which I have perused, except the answer which it proposes to give regarding the second count in the second indictment. In *Regina v. Boyd*, 4 Can. Crim. Cas. 219, the credit was obtained directly by the accused, whose note was discounted and placed to their credit; and, if the present section was intended to put "credit" in the same category as "anything capable of being stolen," there is not in that circumstance anything suggesting an enlargement of the scope of the offence.

The only cases touching the point at issue are at variance. *Regina v. Bryant*, 63 J.P. 376, is against the view that credit given to a third party is within the section. *Rex v. Campbell*, 19 Can. Crim. Cas. 407, 5 D.L.R. 370, is, to my mind, an unsatisfactory case. The facts as stated include this: "Campbell admitted having himself signed this report, and

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he declared that the goods thus obtained were for the company of which he was the president. Campbell admitted that he was the largest shareholder of the company, and that consequently he benefited by the delivery of the goods made by Langlois." The charge to the jury emphasised the fact that the accused had himself made the report, though signing as president of the company. The decision of the Court is thus expressed by Lavergne, J.: "I am inclined to find the proof sufficient to justify the verdict, because the accused is the largest shareholder of the company, and because he benefited by the credit obtained under false pretences, and because he became indebted himself as shareholder of the company, by obtaining this credit under false pretences."

None of these facts, except that Cohen was a director and shareholder, if they have anything to do with the case, are present here. At all events, they are not proved nor before us.

The section, as I read it, makes the obtaining of credit by any person to be the offence, if it is got, (1) by means of false pretences or fraud, and (2) in incurring a liability—i.e., the offence must be committed by the one who incurs the liability and in incurring it.

The simplest illustration of what I think the meaning of the section is will be found in *Regina v. Jones* (1898), 19 Cox C.C. 87.

I do not see that even if the making of the guaranty can be considered as the incurring of a liability, the accused can be said to have got credit thereon, within the meaning of the statute. The guaranty would be unenforceable until the expiry of the credit given to the company, but that was not because the accused got credit, but rather because the company got it. In another view, the credit to the company was not actually obtained until the guaranty was signed, and therefore arose in a different transaction, and was intended to be subsequent to the receipt and acceptance by the bank of the guaranty. Having incurred that liability, if that is its proper description, the accused does not obtain the credit alleged. The company obtains it. I do not think the case comes within the statute referred to.

Judgment as stated by MACLAREN, J.A.

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KENDLER V. BERNSTOCK.

Mechanics' Liens—Failure of Action to Enforce Lien—Personal Judgment against Building Owner—Mechanics and Wage Earners Lien Act, R.S.O. 1914, ch. 140, sec. 49.

In a proceeding under the Mechanics and Wage Earners Lien Act, R.S.O. 1914, ch. 140, to enforce a lien in favour of a contractor, the plaintiff, against the building owner, the defendant, it appeared that the claim of lien was registered in time, but that the action or proceeding was not commenced within the time prescribed by sec. 24; and the plaintiff, therefore, failed to enforce his lien. He was awarded judgment, however, against the defendant personally for the amount for which the lien was claimed; and this was *held* to be right under sec. 49—no application having been made under sec. 27, sub-sec. 5, to vacate the registration of the certificate of *lis pendens*, and the question of the validity of the lien being thus left to be tried in the manner provided by the Act.

APPEAL by the defendant from the judgment of an Official Referee, in a proceeding under the Mechanics and Wage Earners Lien Act, R.S.O. 1914, ch. 140, to enforce a lien, in favour of the plaintiff for payment by the defendant, the building owner, personally, of the amount for which the lien was claimed, the lien not having been established.

February 12. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, J.J.A.

H. H. Shaver, for the appellant, argued that the Referee had no jurisdiction to pronounce a personal judgment, as the lien had expired before proceedings to enforce it had been taken. He referred to secs. 23 and 24 of the Mechanics and Wage Earners Lien Act, R.S.O. 1914, ch. 140, and to *Eadie-Douglas v. Hitch & Co.* (1912), 27 O.L.R. 257. The provisions of sec. 49 did not apply after the lien had expired.

A. Cohen, for the plaintiff, respondent, contended that, as the action had been allowed to proceed to trial without any application having been made to vacate the *lis pendens*, the provisions of sec. 49 applied, notwithstanding the lapse of time referred to in sec. 24, and the personal judgment was correct.

Shaver, in reply.

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March 15. GARROW, J.A.:—Appeal by the defendant from the judgment of an Official Referee in a proceeding brought by the plaintiff to enforce an alleged lien under the provisions of the Mechanics and Wage Earners Lien Act, R.S.O. 1914, ch. 140.

Upon the hearing, the plaintiff failed to establish a subsisting lien, to which extent his claim was disallowed; but, notwithstanding such failure, he was given judgment against the defendant personally for the sum found to be due by the defendant to the plaintiff for the work and material in respect of which the lien was claimed. And the sole question on this appeal is as to the jurisdiction of the learned Referee to award such judgment.

That such jurisdiction exists seems to be clear.

Section 48 of the Act provides that all judgments in favour of lien-holders shall adjudge that the party personally liable shall pay the deficiency, if any, upon a sale.

Section 49 provides that where a claimant fails to establish a valid lien he may nevertheless recover a personal judgment for such sum as may appear to be due to him and which he might have recovered in an action against the party.

There is absolutely nothing in the case that I can see to take it out of the very explicit language of sec. 49; and the appeal should, accordingly, in my opinion, be dismissed with costs.

HODGINS, J.A.:—The only objection on which judgment was reserved was that, the action having been begun after the lien had expired, there was nothing on which to found jurisdiction to pronounce a personal judgment. The mechanic's lien was registered on the 17th July, 1914, and in it the date of the last supply of material was given as the 18th June, 1914. Action to enforce the lien, under sec. 24 of the Mechanics and Wage Earners Lien Act, R.S.O. 1914, ch. 140, should therefore have been begun before the 16th September, 1914. It was not commenced, however, until the 8th October, 1914.

Section 49 provides that where a claimant fails to establish a valid lien he may nevertheless recover a personal judgment against any party to the action for such sum as may appear due to him and which he might recover in an action against such party.

The Official Referee before whom the action was tried held that there was no valid lien—an issue expressly raised in the pleadings—and gave judgment for the amount found by him to be due by the appellant to the respondent.

The Act gives a lien upon the lands of an owner, limited except in certain cases to the amount justly due by the owner to the contractor, which was the relationship of the parties to this action. The lien in this case was registered apparently within the time limited by sec. 22. Under sec. 31, actions to realise all liens must be brought in the Supreme Court of Ontario, and the procedure and mode of trial is therein prescribed. Power is vested in certain officers to exercise the jurisdiction of the Supreme Court in trying and disposing of these actions: *Smeeton v. Collier* (1847), 1 Ex. 457, 462.

There are generally but two issues to be determined: the first, whether a valid lien or more than one exists; and the second, the amount due in respect thereof.

The Supreme Court being seised of an action commenced in it, according to the practice prescribed by the Act, to realise the lien or liens, it becomes a judicial question whether or not a lien or more than one exists, or whether, by reason either of non-compliance with any of the statutory provisions (see secs. 17, 18, 19, 22, 24, 25) or otherwise, the lien or liens has or have ceased to exist. Evidence upon these points must be given at the trial, and the judgment becomes a judgment of the Court (sec. 37, sub-sec. 3), and it is appealable under sec. 40. It is not always a simple matter to decide whether a lien has been registered in time or whether a mechanic's lien proceeding has been begun within the proper time-limit: *Re Moorehouse and Leak* (1887), 13 O.R. 290.

If any one affected by the registration of a lien desires to take advantage of the cesser thereof by reason of the provisions of sec. 23, 24, or 25, he may apply *ex parte* under sec. 27, sub-sec. 5, to vacate the registration of the certificate of *lis pendens*; and, if he is successful, the lien itself may be discharged. In such a case there is no trial, and no judgment can be pronounced. But, where the question is left to be tried, the provisions of sec. 49

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apply, and a judgment for the amount properly due may be had, although no lien is established.

The appeal fails, and must be dismissed with costs.

MEREDITH, C.J.O., and MACLAREN and MAGEE, JJ.A., concurred.

Appeal dismissed with costs.

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[APPELLATE DIVISION.]

WINDSOR AUTO SALES AGENCY V. MARTIN.

Fraudulent Conveyance—Reconveyance by Wife to Husband of Land Conveyed by Husband to Wife—Parol Agreement to Reconvey—Evidence—Corroboration—Intent—Findings of Fact of Trial Judge—Appeal—Estoppel.

In an action against a man and his wife, brought by execution creditors of the wife, to set aside, as fraudulent and void as against the plaintiffs and the wife's other creditors, a conveyance of two parcels of land made by the wife to the husband, it appeared that the land was originally the husband's, and was conveyed by him to his wife on the 13th April, 1914. On the 18th April, 1914, she ordered an automobile from the plaintiffs, and also placed in their hands for sale—they being land agents—one of the parcels of land conveyed to her by her husband. The impeached conveyance, from the wife to the husband, was made on the 30th June, 1914, in consideration of natural love and affection and the sum of one dollar; and the plaintiffs' judgment against the wife, which was for the purchase-price of the automobile, was recovered on the 10th October, 1914. In the present action the trial Judge, LATCHFORD, J., found that the conveyance to the wife was made on the express understanding that, should the husband recover from an illness that he was then suffering from, the wife was bound, upon his request, to reconvey to him; the deed was to become absolute only in the event of his death; and the subsequent conveyance back to the husband was not made with any fraudulent intent on the part of either:—

Held (GARROW, J.A., dissenting), that the judgment of LATCHFORD, J., dismissing the action, should be affirmed.

The question of the intent with which the reconveyance was made was a question of fact.

There is no rule of law which renders it impossible to uphold such a transaction as that in question because of the absence of evidence corroborating the testimony of the parties to the transaction.

The evidence did not warrant the application of the doctrine of estoppel, even if in any case it would be applicable to prevent parties from resisting an attack by a creditor upon a conveyance of property by his debtor, on the ground that it was made with intent to defraud creditors. The person to be estopped was the husband, not the wife; and there was no satisfactory evidence that the husband was a party to the alleged representation of the wife that the land was hers, or that he was present when it was made.

Per GARROW, J.A.:—The conveyance being upon its face voluntary, and its effect in hindering and delaying the plaintiffs and other creditors undoubted, a fraudulent intent should, in the absence of satisfactory explanation, be presumed; and the proper conclusion upon the evidence was, that the alleged parol agreement to reconvey was not proved. The presumption of fraudulent intent in a voluntary conveyance is one of fact, and may be rebutted; but, to rebut it, something more than the evidence of the parties to the transaction is, in such a case as this, necessary.

And, *semble*, that the circumstances amounted to the creation of an estoppel of the husband from disputing the wife's ownership.

THE plaintiffs, execution creditors of the defendant Elizabeth Martin, brought this action to set aside, as fraudulent and void as against them and her other creditors, a conveyance of land made by her on the 30th June, 1914, to her husband, Joseph Martin, the other defendant.

December 3, 1914. The action was tried by LATCHFORD, J., without a jury, at Sandwich.

J. H. Coburn, for the plaintiffs.

T. Mercer Morton, for the defendants.

December 19, 1914. LATCHFORD, J.:—The plaintiffs' judgment is wholly unsatisfied, or was so at the time of the trial. The automobile, for the price of which the judgment was obtained, was under seizure by the Sheriff of Essex, but had not been sold. Although its cost was \$1,875, it is not probable that the car would sell for more than \$800, and Mrs. Martin appears to have no other property liable to seizure.

In March, 1914, the defendants began to look about for a motor car. Mr. Martin was in failing health. It was thought that he would be benefited by frequent airings; and, as he could walk but little, if at all, it was suggested to him that the best means of taking the air was from the seat of an automobile. Mrs. Martin, at first alone and subsequently accompanied by her husband, visited the plaintiffs' garage, and on the 18th April ordered a car costing \$1,375. This was subsequently—about the 6th May—exchanged for another car, and \$500 additional was agreed to be paid to the plaintiffs.

On the 13th April, 1914, Joseph Martin had conveyed to his wife his lands in the city of Windsor and the township of Maidstone.

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I find that this conveyance was made to her on the express understanding that, should the husband recover from the illness he was then suffering from, she was bound, upon his request, to reconvey the lands to him. The deed was to become absolute only in the event of his death.

Martin was childless, but he had many relatives. His illness at the time was serious, and might soon result in death. Both he and his wife thought a will would in that event be more open to attack by his next of kin than a deed. Then there was the possibility that he might recover. He was known to own considerable property; during a long and active life, he had occupied important municipal and other public positions; and he wished, should his illness pass away, to resume his place in the community.

I have no reason whatever to think that their agreement was anything but what the defendants say it was.

Martin did recover his health—not indeed fully, but to a very great extent—and asked for and obtained the reconveyance now the subject of attack.

On the 21st July, 1914, the plaintiffs brought their action for the price of the automobile. The action was against both husband and wife. Their main defence was that the sale was upon a condition which had not been observed. It failed; but judgment was given against Mrs. Martin alone, and the action dismissed as against her husband.

The conveyance of the 30th June was not, I find, made with any fraudulent intent on the part of either defendant. It was not a voluntary conveyance. Under the agreement made between Martin and his wife, prior to the execution by him of the conveyance of the 13th April, she was, at his request, bound to reconvey. In the circumstances, she was merely a trustee for him of the lands included in the conveyance.

An execution against her, in the interval between the 13th April and the 30th June, could not bind the lands which were subject to the equity and trust in her husband's favour. See *Jellett v. Wilkie* (1896), 26 S.C.R. 282, especially the judgment of Strong, C.J., at p. 289, and the cases there cited as conclu-

sively establishing the principle that an execution creditor can only sell the property of his debtor subject to all such liens, charges, and equities as the same was subject to in the hands of his debtor.

The plaintiffs would, therefore, fail to recover against the lands in question, even had the conveyance they impeach not been made.

I find nothing which operates against Mrs. Martin by way of estoppel. It was with her husband's consent that she authorised the plaintiffs to sell the farm in Maidstone for \$10,000—a price at which both defendants were quite willing the farm should be sold.

The action fails, and is dismissed with costs.

The plaintiffs appealed from the judgment of LATCHFORD, J.

February 15, 1915. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A., and BRITTON, J.

J. H. Rodd, for the appellants, pointed out that there was no corroboration of the testimony of the defendants as to the alleged agreement; and contended also that the defendants were estopped. The husband was present when the wife stated that she was the owner of the property: *Pickard v. Sears* (1837), 6 A. & E. 469, at p. 474; *Gregg v. Wells* (1839), 10 A. & E. 90. "Wilfully" means "voluntarily:" *Freeman v. Cooke* (1848), 2 Ex. 654. The husband did not know till after his recovery that the property was to be reconveyed to him. See Everest and Strode's Law of Estoppel, 2nd ed., pp. 325, 333, 334; Bigelow on Estoppel, 6th ed., p. 603, *et seq.*

T. Mercer Morton, for the defendants, the respondents, cited *Gibbons v. Tomlinson* (1891), 21 O.R. 489, as on all fours with this case. He further contended that, as estoppel was not pleaded, it could not now be raised: *Mackenzie v. Gray* (1914), 17 D.L.R. 769, and cases there cited. The findings of the trial Judge are warranted by the evidence.

March 15. MEREDITH, C.J.O.:—This is an appeal by the plaintiffs from the judgment, dated the 19th December, 1914,

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which was directed to be entered by Latchford, J., after the trial before him, sitting without a jury at Sandwich, on the 3rd December, 1914.

The appellants are execution creditors of the respondent Elizabeth Martin for \$1,917.30 and costs, and bring their action to set aside, as fraudulent and void as against them and her other creditors, a conveyance made on the 30th June, 1914, by her to her husband, Joseph Martin, the other respondent.

The judgment upon which the execution was issued was recovered on the 10th October, 1914, on promissory notes given by the wife in respect of the purchase-price of an automobile bought by her from the appellants. On the 18th April, 1914, she gave an order to the appellants for an automobile, for which she agreed to pay \$1,375. The automobile was ready for delivery on the 6th May following, and on that day she gave to the appellants the joint promissory note of her husband and herself, payable in one month, for the whole of the purchase-price, with interest at seven per cent. This note was not paid at maturity, and, on the 11th June following, a new note of the wife alone for \$1,384.35, payable in eight days, with interest at the same rate, was given. This note also was not paid at maturity, and a new note for \$1,387.30, payable on the 1st July following, with interest at the same rate, was given by the wife on the 22nd June, 1914. In the meantime, the automobile had been exchanged for a higher-priced one, and a note at one month, with interest at the same rate, was given by the wife on the 17th June, 1914, for \$500, which represented the difference in price on the exchange; and it was upon this note and the note for \$1,387.30 that the judgment was recovered.

The appellants, besides being agents for the sale of automobiles, were agents for the sale of land, and on the 18th April, 1914, and at the same time that the order for the first automobile was given, the wife placed in their hands for sale lot No. 12 in the 9th concession of the township of Maidstone, one of the parcels of land in question in this action, and discussed with them the question of obtaining a loan on mortgage of the lots in Windsor that are in question.

The respondents allege that the impeached conveyance was executed in pursuance of an arrangement made between them when the lands which were reconveyed were conveyed by the husband to the wife on the 13th April, 1914. The consideration expressed in the conveyance is natural love and affection and one dollar.

The circumstances under which the property was conveyed to the wife, as she and her husband testified and the learned trial Judge found, were these. The husband had been an active business man, but had fallen into bad health, and was advised by his physician that he might not recover, and that he had better put his worldly affairs in order. A will was made devising the property to the wife, but on account of the fears of the wife that the will might be attacked by the husband's next of kin, it was decided that a deed should be made to the wife, on the understanding and agreement that, if the husband recovered his health sufficiently to attend to his business, the wife should reconvey the property to him, and upon that understanding and agreement the conveyance to the wife was made. The husband did recover sufficiently to be able to attend to his business, and the reconveyance was then made to him in pursuance of the understanding and agreement upon which the property had been conveyed by him to his wife.

The question of the intent with which the reconveyance was made was a question of fact, and the learned Judge who saw and heard the witnesses was in a much better position to judge as to their credibility than an appellate Court can be; he has given credit to their testimony, and his finding of fact, especially as it is a finding which acquits the respondents of the fraud with which they are charged, ought not, in my opinion, to be disturbed. While it is true that the absence of evidence corroborating the testimony of the parties to a transaction impeached as fraudulent against creditors is a circumstance, and an important one, to be considered in determining as to the intent with which the transaction was entered into, there is no rule of law that I am aware of which renders it impossible to uphold such a transaction because of the absence of such corroborative evidence.

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Such an arrangement as the respondents testified was made was not an improbable one in the circumstances. I doubt very much whether the wife could successfully have resisted an action by the husband to set aside the conveyance to her on the ground of its improvidence, if the effect of it was entirely to divest him of any interest in the property. As I understand the evidence, the conveyance covered everything he possessed, and there are frequent instances in which such conveyances, made without consideration, have been set aside as improvident.

The circumstance that the reconveyance was made after the wife had become indebted to the appellants may be a suspicious circumstance; but mere suspicion as to its *bona fides* does not warrant the setting of it aside; still less does it warrant the setting aside of a finding by an experienced Judge that it was made in good faith and without any fraudulent intent.

The fact that the wife placed the farm property in the hands of the appellants for sale, and that she expressed her intention of borrowing money on a mortgage of the city property, although it was part of the agreement upon which the property was conveyed to her that she should not sell or mortgage it, is, in my opinion, not inconsistent with the existence of the agreement which the respondents testified was made as to the reconveyance of the property to the husband, because he was an assenting party to what his wife did and proposed to do.

The doctrine of estoppel was much relied on by the learned counsel for the appellants, but the evidence does not warrant the application of it, even if in any case it would be applicable to prevent parties from resisting an attack by a creditor upon a conveyance by his debtor of property on the ground that it was made with intent to defraud creditors.

There was, no doubt, evidence that the wife represented to the appellants that she was the owner of the property. I doubt very much whether she did so in words, but the fact of her placing the farm in the hands of the appellants for sale, and expressing her intention to borrow upon mortgage of the city property, may well have led the appellants to believe that she was the owner of both properties, and is probably the only

ground the witnesses had for saying that she represented that she was the owner of them. However that may be, and assuming that the representation was made, there was no satisfactory evidence that the husband was a party to it or was present when it was made.

The appellant Burnes testified that the representation was made by the wife, but declined to say that the husband was present when it was made. The witness Welch does say that the wife told him, before the order for the automobile was given, that the property was hers. He also testified that this was said in the presence of "everybody," but who "everybody" was he did not say. He also testified that the wife, addressing her husband, said in French: "Now, Joe, are you satisfied with this? You know everything belongs to me, but I want you to be satisfied." I cannot understand what there was to call for any such remark from her; and that such a thing was said seems to me most improbable.

If, as I think, there was no satisfactory evidence that the husband was a party to the alleged representation of his wife, or present when it was made, there is an end to all question of estoppel, because the person to be estopped, if estoppel is to help the appellants, is the husband, and not the wife.

It may seem a hard case, if the appellants sold the automobile to the wife under the belief induced by her conduct or by her representation in words that she was the owner of the property, that they should not have the right to look to it for payment of their judgment, but if, as was stated upon the argument, the respondents were willing and offered to return the automobile, which is valued at \$800, and pay \$1,000 besides in satisfaction of the judgment, and that offer was refused, the appellants have not much to complain of; and, in any case, we should resist the inclination on account of the hardship of the case to make bad law or establish a vicious precedent, which, in my opinion, we should do if we were to reverse the judgment of my brother Latchford.

I would dismiss the appeal with costs.

MACLAREN, J.A.:—I agree.

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MAGEE, J.A.:—As between the defendants, there seems no sufficient reason to question the conclusion of the trial Judge that the husband was entitled to have a reconveyance of the property from his wife. The only right in the plaintiffs to prevent that must be based upon the ground of some estoppel. As the husband originally joined with the wife in making the promissory notes to the plaintiffs, no estoppel could arise, for the plaintiffs did not act to their prejudice upon the faith of any representation that the property belonged to the wife. No one then had in contemplation that the plaintiffs would release the husband and accept subsequently notes signed by the wife alone. Any representation by the husband, even if proven, was therefore only casual and collateral to the transaction, and not one which should entitle the plaintiffs to prevent the husband from insisting upon his right to the land, as it could make no difference to them. That they subsequently accepted the note of the wife alone is not shewn to have been brought about by any subsequent request, course of action, or statement or representation by the husband; and no case for estoppel arises out of an alleged representation made previously, upon which the plaintiffs did not act at the time, and not made with a view to such transaction as subsequently occurred between the wife and the plaintiffs.

Whether the plaintiffs could now hold the husband to the liability from which he was released under a mistake of the facts is another matter, and not in question here.

I think the appeal should be dismissed.

BRITTON, J.:—I agree in the result with the judgment of the Chief Justice of Ontario for the following reasons:—

(1) The impeached conveyance cannot be set aside in the absence of fraud on the part of the defendant judgment debtor. The trial Judge has found that there was no fraud. Any fraud that might otherwise be implied from the fact that the conveyance was voluntary, and that the effect of it might be to defeat or delay the creditors, is rebutted by the facts in this case. The property which the creditors seek to make liable for their debt was unquestionably the property of the husband, and, only a short time before the plaintiffs' judgment,

it became the property of the wife, by a voluntary conveyance, for a perfectly proper purpose; and, when there was no longer need for the purpose named, the wife by a voluntary conveyance returned the property to her husband. That, in my opinion, might be a proper and an honest transaction, not necessarily tainted to the smallest extent.

(2) The doctrine of estoppel has no application in this case. The husband, of course, would be estopped from claiming as against a *bonâ fide* purchaser from the wife, and as against any person dealing with the wife in regard to the property conveyed, while she held it. No matter what the wife asserted as to the title—as to the real ownership—she could deal with the property as between herself and her husband, and, if without fraud, no creditor of hers can complain. A statement by the wife cannot be used to the prejudice of the husband in some subsequent transaction, unless that subsequent transaction is in itself fraudulent so as to give a creditor the right to complain of the act alleged to be fraudulent.

GARROW, J.A. (dissenting):—The action was brought by the plaintiffs, as execution creditors of the defendant Elizabeth Martin, to have set aside a conveyance by her to her husband and co-defendant Joseph Martin, of lands in the county of Essex, upon the ground that such conveyance was made with intent to delay and hinder the plaintiffs in collecting their debt.

The plaintiffs' judgment was for \$1,917.30 and \$192 for the costs of the action, and was recovered in the month of October, 1914. The indebtedness of the defendant Elizabeth Martin to the plaintiffs in respect of which judgment was recovered, being for the price of an automobile, existed at and before the date of the conveyance, namely, the 30th June, 1914.

The only consideration expressed in the conveyance is "natural love and affection and the sum of one dollar;" and the property therein mentioned and described comprised, so far as appears, the only property of the defendant Elizabeth Martin, except the automobile, which could be levied upon to satisfy the plaintiffs' judgment.

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The conveyance being upon its face voluntary, and its effect in hindering and delaying the plaintiffs and other creditors undoubted, there is abundant authority for presuming, in the absence of satisfactory explanation, the fraudulent intent which the plaintiffs allege. See *Freeman v. Pope* (1870), L.R. 5 Ch. 538. To rebut the presumption, the plaintiffs say that the defendant Elizabeth Martin held the lands in question upon trust for the defendant Joseph Martin, and that she reconveyed to him in pursuance of that trust. The story as told in the evidence is, that the defendant Joseph Martin, by a conveyance dated the 13th April, 1914, for the therein expressed consideration of natural love and affection and of the sum of one dollar, conveyed the lands to his co-defendant, Elizabeth Martin, in fee simple. He was then, and for some time previous thereto had been, in ill-health, from which recovery was regarded as doubtful. He had made a will in favour of his wife, but she was apprehensive, so it is said, that if her husband died—they being childless—his brothers would probably attack the will, and at her request the conveyance mentioned was executed. And it is also said that at the time of the making of the first conveyance it was agreed that the defendant the wife should reconvey, upon request, if her husband recovered. The husband's account of how the deed came to be made is:—

“Q. I believe you deeded your property to your wife in April last? A. Yes.

“Q. Now will you tell us why you did that? A. Well, I gave that because I was in danger of dying; that is what the doctor told me and told my wife; and, when I find out that my brothers they want to come to have the right to my property, I said, ‘No, I will give it to my wife, if I die it will be for herself, to support her, to get the property.’

“Q. If you died? A. If I died; but, if I didn't die, I will be able to do my business as I used to do it before I was sick, and I would return my property; and I said, ‘I don't want you to mortgage my property, and I don't want you to sell any;’ and she didn't sell any.

“Q. How long have you been sick? A. Sick since last fall till about a month, and I am fair to do business all right. I am

not as strong as I might be one time, but I am strong enough to do my business.

“Q. Now then, you got a deed back of that property? A. I had back like she agreed. She agreed if I come better to do my business in there as I used to one time, that she would give me my property, and she did.”

In cross-examination he was asked:—

“Q. You wanted to make sure she would have it free from attack of your brother or any one else? A. Yes, but if living I expected her to deed it back.

“Q. You expected her to deed it back if you got well? A. Yes.”

The wife's statement of what occurred is: “I said to Mr. Martin, ‘I believe I will have trouble, because they (the brothers) will certainly protest the will.’ I said, ‘Won’t you deed me your property, and if you live I will give it to you back as soon as you are able to do any business for yourself?’ and he consented. . . . He was deeding the property to me. He said, ‘I will make a deed of it, and if I get better to transact my own business you have to deed it to me back again;’ and I said, ‘Certainly I will;’ I didn’t want to be boss.”

So far as appears, no request was ever made by the husband for a reconveyance before it was executed—all that is said about it is what the wife said:—

“Q. Was there anything said about deeding it back before you did deed it back? A. Yes; I went up to Mr. Wigle’s office three weeks before this time, and I said, ‘Mr. Wigle, Joe is getting better;’ and I said: ‘Will you make out these papers to him? I want to give him back this property as agreed upon.’ Mr. Wigle said, ‘All right;’ so I returned a couple of days afterwards, and he was gone to London with the soldiers, and I went several times, but he wasn’t back.

“Q. And then you afterwards had it drawn by some one else, or who did draw it? A. Mr. Rodd.”

No mention is made by the wife of the restriction that she would not sell or mortgage, nor is there any evidence as to the husband’s state of health at the time of the reconveyance, the

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30th June, 1914, except in the wife's answer before quoted when she went to see Mr. Wigle. The improvement, if any, must have been very slow, for in one of the answers given by the husband, also before quoted, he said he had been sick since last fall till about a month prior to the date at which he was then speaking, namely, the day of the trial on the 3rd December, 1914, and that he was not even yet fully recovered.

The conveyance to the defendant Elizabeth Martin was made on the 13th April, 1914. Five days afterwards, the automobile was purchased by her on credit, she representing at the time, as the evidence very clearly shews, that she owned all the property. And on the same day, notwithstanding the prohibition against selling, to which the husband swears, she gave to the plaintiffs a written option to sell the farm lands for her. And she also, in apparent contravention of the alleged condition as to mortgaging, endeavoured to obtain a loan of \$8,000 on the property for the purpose of building a block of buildings thereon, and of paying the plaintiffs' claim, so she deposed, but says that she always consulted her husband as to such matters. As a matter of fact, he was present when the option to sell was given, but it does not, I think, appear that he was made aware of the attempts of his co-defendant to obtain a loan, except from her general statement that she always consulted or told him what she was doing.

Latchford, J., appears to have accepted the defendants' account of the matter. I, with deference, am not able to do so. The case is to me one of very great suspicion. The conveyancing, in the case of both conveyances, was not done by an ignorant country conveyancer, but by a well-known firm of solicitors. If they were informed, in their instructions, of the agreement to reconvey, it is quite inconceivable that there should be nothing in writing, not even a recital, to shew that such an agreement was made.

The alleged object of the conveyance of April was, that the defendant Elizabeth Martin might have a safer and more absolute title, if possible, than she could have by a testamentary devise to her. The agreement, if made, of course left matters very much where they were, for the property was always, they say, the husband's unless he died.

It is very hard to understand the conjunction of the urgency in April to obtain the conveyance, with the apparent haste to reconvey in less than three months afterwards, apparently without the least pressure by or even a request from the husband. The brothers were still, no doubt, as threatening as ever, and the husband was still not recovered from his illness. In the meantime, this rather large indebtedness had been incurred. No notice was apparently taken of it in reconveying, and certainly no provision was made for its payment by either defendant. The male defendant was afterwards sued for it jointly with his wife, and successfully defended himself, while the wife was held as the real debtor, quite properly no doubt.

Under all the circumstances, the proper conclusion upon the evidence, in my opinion, is, that the alleged parol agreement to reconvey was not proved, and that the conveyance in question is, therefore, voluntary and fraudulent and void against the plaintiffs, and should be set aside.

The presumption of fraudulent intent in a voluntary conveyance is one of fact and not of law, and so of course may be rebutted. See *Ex p. Mercer* (1886), 17 Q.B.D. 290; *Carr v. Corfield* (1890), 20 O.R. 218. But it has been repeatedly, and I think wisely, held that to rebut the presumption something more than the evidence of the parties to the transaction is required: see *Merchants Bank v. Clarke* (1871), 18 Gr. 594; *Morton v. Nihan* (1880), 5 A.R. 20, 28; *Rice v. Rice* (1899), 31 O.R. 59, affirmed (1900), 27 A.R. 121. The rule may not be of universal application, but it seems to be particularly applicable to such a case as this.

Nor can the male defendant complain, for it is quite clear, I think, on the evidence, that he was aware that his wife and co-defendant was at least holding herself out to the plaintiffs as the owner of the property and obtaining credit in that character, under circumstances which, as contended by the learned counsel for the plaintiffs, probably amounted to the creation of an estoppel upon him from disputing her ownership.

The appeal should, in my opinion, be allowed with costs here and in the Court below.

Appeal dismissed; GARROW, J.A., dissenting.

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Ditches and Watercourses Act—Construction of Drain—Award—Infant's Land—Notice Served on Infant's Father—"Guardian of an Infant"—R.S.O. 1897, ch. 285, secs. 3, 8—Invalidity of Proceedings—Fundamental Defect.

The guardian intended by the interpretation clause (sec. 3) of the Ditches and Watercourses Act, R.S.O. 1897, ch. 285, is such a guardian as has by law the management and control of the infant's land, and not merely the guardian of his person; and notice of proceedings under the Act, given to the father of an infant whose land was affected by the proceedings—the father not having been appointed guardian of the infant's estate—was held insufficient to satisfy sec. 8 of the Act, which requires notice to be given to every "owner;" and the result was, that the infant was not properly made a party to the proceedings, and was not bound by the award, and the whole drainage scheme fell to the ground. Judgment of MIDDLETON, J., 32 O.L.R. 184, reversed.

APPEAL by the plaintiffs from the judgment of MIDDLETON, J., 32 O.L.R. 184, dismissing the action.

February 16. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A.

S. S. Sharpe, for the appellants. The engineer must supply a sufficient outlet: *Ditches and Watercourses Act*, R.S.O. 1914, ch. 260, sec. 6; *Township of McKillop v. Pidgeon* (1908), 11 O.W.R. 401; *McGillivray v. Township of Lochiel* (1904), 8 O.L.R. 446; *In re McCrae and Village of Brussels* (1904), 8 O.L.R. 156. Section 23 of the Act, as to defects in form or substance, does not cure all defects: *Maisonneuve v. Township of Roxborough* (1899), 30 O.R. 127, where failure to file a declaration of ownership was held not to be cured; *Turtle v. Township of Euphemia* (1900), 31 O.R. 404; *Township of Osgoode v. York* (1895), 24 S.C.R. 282; *Township of Colchester North v. Township of Gosfield North* (1900), 27 A.R. 281. The appellants attack the award on the ground that the infant plaintiff was not served: sec. 23 cannot avail to cure a want of jurisdiction. Service on the infant's father was not sufficient. Guardianship for nurture ceases at fourteen years of age. On the question of the meaning of "guardian," see *Platt v. Platt* (1880), 28

W.R. 533; Eversley on Domestic Relations, 3rd ed., p. 611; *Rimington v. Hartley* (1880), 14 Ch.D. 630. See also the Infants Act, R.S.O. 1914, ch. 153, secs. 11, 19. The meaning of "owner" is given in the Ditches and Watercourses Act, sec. 2(j).

J. T. Mulcahy, for the defendants respondents. On the question of infancy and notice, see the statute, sec. 2(j), which says "owner" for the purposes of this Act need not be the real owner, but may be the guardian of an infant owner. See Stroud's Judicial Dictionary as to the meaning of "guardian." The decision in *Rimington v. Hartley*, 14 Ch.D. 630, is not in point, but the remarks of Sir George Jessel, M.R., shew the wide meaning the word "guardian" may have.

March 15. The judgment of the Court was delivered by GARROW, J.A.:—Appeal by the plaintiffs from the judgment of Middleton, J., at the trial, dismissing the action.

The case is reported in 32 O.L.R. 184, where the facts sufficiently appear.

Upon the argument before us, we declined to enter upon the question of the merits of the award, which counsel for the plaintiffs desired to discuss. See *In re McLellan and Township of Chinguacousy* (1900), 27 A.R. 355.

The plaintiffs also object to the proceedings upon the ground that, when they were instituted, the plaintiff William Johnston the younger, one of the "owners," was an infant and was not duly served with notice of the proceedings as required by the statute.

The statute in force when the proceedings began was R.S.O. 1897, ch. 285 (the Ditches and Watercourses Act*).

*Section 8 of this statute is as follows: "The owner of any parcel of land who requires the construction of a ditch thereon shall, before filing with the clerk of the municipality the requisition provided for by section 13 of this Act, serve upon the owners or occupants of the other lands to be affected a notice in writing (Form C) signed by him and naming therein a day and hour and also a place convenient to the site of the ditch at which all the owners are to meet and estimate the cost of the ditch, and agree, if possible, upon the apportionment of the work, and supply of material for construction, among the several owners according to their respective interests therein, and settle the proportions in which the ditch shall be maintained, and the notices shall be served not less than twelve clear days before the time named therein for meeting."

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By sec. 3, the word "owner" is interpreted to mean and include (1) an owner, (2) the executor of an owner, (3) the guardian of an infant owner, (4) any person entitled to sell and convey the land, (5) an agent under a general power of attorney or a power of attorney authorising the appointee to manage and lease the lands, and (6) a municipal corporation in respect of highways under its jurisdiction.

At that time William Johnston the younger was about 17 years of age. He resided with his father, William Johnston the elder, who was also an "owner" within the drainage scheme. It was apparently at first assumed that the father owned both lots. He was duly served with notice, and at the meeting informed the engineer that his son owned one of the lots. The engineer then verbally informed the son that proceedings were being taken, but no fresh notices were served upon any one.

Not much help is, I think, to be derived from the two contradictory English cases to which the learned Judge refers in his judgment. The language there under consideration was quite different. There was no such context as we have here in the case of agents and other representatives of owners whose lands are involved in the scheme, and the consent to be given, by whomsoever given, had, for the protection of the infant, always a much-favoured person, to be approved by the Court. There is no similar protection in our statute.

An infant, it is clear, may have more guardians than one. To put the simplest case, he may have a guardian of his person, and another and a different person as the guardian of his estate. The father may, it is true, if he desires it, be both. See the Infants Act, R.S.O. 1914, ch. 153, sec. 26. But, if he is intended to have the management and control of the infant's property, he is not exempt from giving proper security under sec. 27.

By force of the interpretation clause of R.S.O. 1897, ch. 285, the guardian of the infant may not only be brought in as a party to the proceedings under the statute, but he may also originate them, for he has all the powers of an owner, apparently, including that of entering into an agreement respecting

the drainage scheme under sec. 9, which, when executed and filed, has all the effect of an award.

If there were two guardians, that is, one of the person and the other of the estate, there would, I suppose, be little doubt that the proper guardian to act under the statute would be the one entitled by law to manage the estate, and not the one entitled to control the person only. The Legislature might, of course, have conferred the power upon the guardian of the person only; but, considering the extensive powers of the guardian and finding the equivocal word in its present company, with other agencies all more or less associated directly with the management and control of the land of the owner represented, I cannot help thinking that the guardian intended by the statute was such a guardian as, by law, has the management and control of the infant's land, and not merely the guardian of his person.

The result is that, in my opinion, the plaintiff William Johnston the younger was not properly made a party to the proceedings, and was not and is not bound by the award.

That being so, it seems to follow, as the plaintiffs contend, that the whole drainage scheme falls to the ground. The objection is fundamental, like the objection to the absence of a proper initiating "owner" which proved fatal in *McKillop v. Township of Logan* (1899), 29 S.C.R. 702, even after the work had all been done.

The appeal should therefore, in my opinion, be allowed. But, under the circumstances, there should be no costs to either side here or below.

Appeal allowed.

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March 15.

Railway—Injury to Person Crossing Tracks of Electric Railway on Company's Land—Private Driveway across Tracks—Dangerous Crossing—Duty to Give Warning of Approach of Car—Negligence—Evidence—Findings of Jury.

The defendant company owned and operated its electric railway upon a strip of land adjoining a highway. In order to reach the highway from the house of one C., it was necessary to cross this strip and the defendant company's tracks. For this purpose a planked way had been constructed. Owing to trees on C.'s land, persons operating a car on the tracks could not see any one approaching the tracks from C.'s house until the car had almost reached the crossing. The plaintiff attempted to drive a waggon across the tracks at this crossing; the waggon was struck by a car of the defendant company, and the plaintiff was injured. At the trial of an action to recover damages for his injuries, there was evidence that no warning by bell or whistle was given of the approach of the car, and that it was running at a rate of from 20 to 25 miles an hour; and the jury found negligence of the company which caused the injury; that the crossing was an unusually dangerous one; that the company should use necessary caution in such places, by sounding an alarm and running at a slower rate of speed; and no contributory negligence of the plaintiff:—

Held, that the findings were warranted by the evidence, and the plaintiff was entitled to recover.

Grand Trunk R.W. Co. v. McKay (1903), 34 S.C.R. 81, and *Bell v. Grand Trunk R.W. Co.* (1913), 48 S.C.R. 561, distinguished.

Semble, per MEREDITH, C.J.O., that, if the crossing had been a highway crossing, the *McKay* case would have applied: in regard to a highway crossing, the Railway Act prescribes what the duty of the railway company is, and the warning to be given by approaching trains; and, according to that case, it is not competent for a jury to add to these safeguards.

Per HODGINS, J.A.:—Neither of the cases cited assisted in the determination of the question raised in this case: the rule laid down in them is expressly limited to highway crossings; and the accident in this case did not happen in a thickly peopled portion of a city, town, or village. Judgment of KELLY, J., affirmed.

ACTION to recover damages for injuries sustained by the plaintiff while driving a horse and waggon over a crossing of the defendant company's line called "Carpenter's crossing," owing, as the plaintiff alleged, to the negligence of the defendant company, the negligence charged being that a car of the defendant company, operated by electricity upon the defendant company's railway, which came into collision with the waggon, was being driven at an excessive rate of speed, and that no proper warning of the approach of the car was given.

October 31, 1914. The action was tried before KELLY, J., and a jury, at Hamilton.

G. Lynch-Staunton, K.C., and *M. Nesbitt*, for the plaintiff.

D. L. McCarthy, K.C., for the defendant company.

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December 31, 1914. KELLY, J.:—The lands over which defendant company's cars run, at the place where the plaintiff received his injuries, are owned by the defendant company. At that point, there is a driveway from the public road across the defendant company's tracks and continuing into and through Carpenter's lands to his dwelling-house.

The plaintiff, who had in the course of his employment driven a delivery waggon of his employer over this driveway to Carpenter's house to deliver goods there, was returning when he was struck by the defendant company's car. The jury found negligence by the defendant company, in that it was "an unusually dangerous crossing," adding, "We think they should use necessary caution in such places, we think they should sound an alarm in such places;" and they negatived negligence by the plaintiff. In answer to a question I put to them, when they had answered the other questions, they supplemented their answers by indicating that the defendant company's lack of caution was in not sounding an alarm, and that the speed (of the car) might have been slower.

There is evidence that Carpenter's property at this place is thickly grown with trees, through which the driveway passes, which very much shut out the view of the public road from those passing along the driveway where the plaintiff passed just before the accident. The jury may have had this in mind when referring to the necessity of using caution.

This crossing is not a highway crossing, and this case is not brought within sec. 155 of the Ontario Railway Act, R.S.O. 1914, ch. 185, though it was vigorously contended for the plaintiff that the crossing, from its being the usual means of entry to the private property of Carpenter, over which persons have the right to pass in order to reach Carpenter's lands and house, is of the character of a highway crossing, if it is not a crossing on a highway.

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There was considerable evidence on the question of whether a bell was rung or a whistle blown as the car approached the place of the accident, some witnesses saying that no such warning was given, or none that they heard; some adding that, if such warning had been given, they would have heard it. (The men in charge of the car were not called.) This was evidence on which the jury could well have based their finding that an alarm was not sounded. The inference to be drawn from the jury's findings is, that an alarm was not sounded in this instance; that there was a failure to use necessary caution, both as to sounding an alarm or warning, and in the rate of speed, at a place which they say was unusually dangerous.

I cannot see that there was any statutory obligation upon the defendant company to give a warning such as sounding an alarm—a bell or whistle.

But, apart from any duty imposed upon it by statute, I am of opinion that it was under obligation to exercise care, which the jury, in the above view, find that it did not exercise. The plaintiff was not outside of his rights in being upon the defendant company's lands when the accident happened. The driveway across the defendant company's tracks, built and used as it was, affording a means of entry to Carpenter's property from the public road, must be taken to have been there with the consent and approval of the defendant company. Provision was made, by whom it is not clear, for the more easy crossing over the tracks, by means of planks laid between the rails so as to bring the driveway to or near the rail level; and the existence and use of the driveway were such that the defendant company must have been aware that persons were in the habit of crossing its tracks as a means of ingress and egress to and from Carpenter's property for those whose business brought them there, and who had thus at least permission or license to pass over the defendant company's lands.

Though I have reached my conclusion with some hesitation, I am of opinion that, in view of the circumstances, and apart from statutory obligation, there was a duty to give warning for the protection of those so crossing at this dangerous place, and

which the jury in effect find was not given. If that view be correct, the judgment should be for the plaintiff for the amount assessed by the jury, and costs.

The defendant company appealed from the judgment of KELLY, J.

February 15, 1915. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

D. L. McCarthy, K.C., for the appellant company. The question involved in this appeal is, whether there is any obligation on the company to sound a bell or whistle when a car is being operated on the company's own land. I refer to the Ontario Railway Act, R.S.O. 1914, ch. 185, secs. 101, 104, 105, 112-115, 155(2), and to the interpretation clause, sec. 2(h), where "highway" is defined; *Grand Trunk R.W. Co. v. McKay* (1903), 34 S.C.R. 81; *New Brunswick R.W. Co. v. Vanwart* (1889), 17 S.C.R. 35, at p. 38. The company runs the cars as fast as it likes on its own right of way, even at a place where it has given a right to another to cross: *Grand Trunk R.W. Co. v. Anderson* (1898), 28 S.C.R. 541. See also *Lake Erie and Detroit River R.W. Co. v. Barclay* (1900), 30 S.C.R. 360: and pp. 49-51 of the appellant company's factum in the Supreme Court of Canada in *Grand Trunk R.W. Co. v. McKay*, *supra*. The question of speed is for the Railway and Municipal Board only.

G. Lynch-Staunton, K.C., and *H. S. Robinson*, for the plaintiff, respondent. R.S.O. 1914, ch. 185, sec. 104, does not give the Board power over signals, precautions, etc., at unusually dangerous places. We refer to *Bell v. Grand Trunk R.W. Co.* (1913), 48 S.C.R. 561, at pp. 566, 567, where *Grand Trunk R.W. Co. v. McKay*, *supra*, is distinguished upon the facts; *Smith v. Niagara and St. Catharines R.W. Co.* (1904), 9 O.L.R. 158, at p. 160, and cases cited there. As to "farm crossings," see *Toronto Hamilton and Buffalo R.W. Co. v. Simpson Brick Co.* (1909), 17 O.L.R. 632. This crossing was a highway crossing, as defined in the "Esplanade case," *Canadian Pacific R.W. Co. v. Toronto Corporation*, [1911] A.C. 461, at p. 477. See further sec. 2(h) and sec. 157 (5) of ch. 185. This is a high-

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way crossing, i.e., a crossing to and from a highway; but, if it should be found not to be a highway, the plaintiff still should succeed at common law. In sec. 157, sub-secs. 2 and 4, the Legislature is dealing with thickly populated districts. See, as to the construction of similar provisions, *Grand Trunk R.W. Co. v. Washington*, [1899] A.C. 275. On the question of the duty to take care, see *Barrett v. Midland R.W. Co.* (1858), 1 F. & F. 361; *Harrison v. North Eastern R.W. Co.* (1874), 29 L.T.R. 844; *Girouard v. Canadian Pacific R.W. Co.* (1901), 1 Can. Ry. Cas. 343, and "Notes on Signals at Highway Crossings," at pp. 347 *et seq.*

March 15. MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment dated the 31st December, 1914, which was directed to be entered by Kelly, J., on the findings of the jury at the trial before him at Hamilton on the previous 31st day of October.

The action is brought to recover damages for injuries sustained by the respondent while driving a horse and waggon over a crossing of the appellant's line called "Carpenter's crossing," owing, as is alleged, to the negligence of the appellant; and the negligence charged is, that a car of the appellant which came into collision with the waggon was being driven at an excessive rate of speed, and that no proper warning of the approach of the car was given.

The collision occurred in the afternoon of the 3rd March, 1914; the respondent, a boy of the age of 17 years at the time of the trial, was engaged in delivering groceries for his employer, whose horse and waggon he was driving. On that day, he had occasion to deliver groceries at the house of Mr. Frank Carpenter, which is reached by a crossing from the highway over the 16 ft. strip of land owned and occupied by the appellant for its railway, and thence by a driveway on Carpenter's own land, and at the place of crossing the tracks were planked over. On both sides of the driveway, Carpenter's grounds are somewhat densely timbered, and the trees extend almost to the tracks and form an obstruction to the view in both directions of a per-

son driving out by the driveway to the highway, until he has almost reached the first line of rails. A car was coming westward, and there was evidence that it gave no warning by bell or whistle of its approach; that it was running at a rate of from 20 to 25 miles an hour; that the respondent stopped his horse when about half-way down the driveway, which was about 50 yards in length, and listened for the sound of an approaching car, and, hearing none, drove on at a trot; that when he had reached the track the car came up and struck the waggon, with the result that the respondent was severely injured; and that the waggon was carried, according to the testimony of one witness, about 75 yards, and of another about 40 yards, before the car was brought to a stop.

The jury, in answer to questions, found:—

(1) That the appellant was guilty of negligence which caused the injury to the respondent.

(2) That the crossing was an unusually dangerous one, that the appellant should use necessary caution in such places and should sound an alarm in such places.

(3) That the respondent was not guilty of contributory negligence.

And, in answer to further questions of the learned Judge, the jury said that the caution that should have been taken was “sounding an alarm” and “by running at a slower rate of speed;” and they added, “Then there were the trees in the way;” and upon these findings the judgment was directed to be entered.

Before considering the questions argued before us, it will be well to ascertain what were the rights of Mr. Frank Carpenter in respect of the crossing over the appellant's tracks leading from his driveway to the highway. A conveyance dated the 31st October, 1895, of a strip of land 314 ft. long and 16 ft. wide, from George W. Cline to the appellant, was put in at the trial, and was shewn to cover the land lying immediately in front of Carpenter's land, and upon it the railway is constructed. What title Cline had to the land was not shewn, nor was it shewn how Carpenter had derived title to his land. The proper

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inference is, I think, that Cline was the owner of the land which now belongs to Carpenter and of the strip which he conveyed to the appellant; and, if that be the case, as the sale of the strip cut off all access from the remainder of the land to the highway, the owner of the land cut off became entitled to a way of necessity over the strip conveyed, from his land to the highway; and I shall deal with the case on the assumption that the planked crossing was the way agreed upon between the owner of the land and the appellant as the way which was to be used. If, however, the evidence does not furnish the necessary data for determining what the right of Carpenter is, the respondent, if he so desires, should be allowed to prove by affidavit the chain of title and that the land remaining after the conveyance to the appellant was land-locked.

Counsel for the appellant relied upon *Grand Trunk R.W. Co. v. McKay*, 34 S.C.R. 81, as authority for the proposition that, apart from statutory restrictions or regulation by the Ontario Railway and Municipal Board, the appellant was entitled to run its cars at any rate of speed that it chose, and was not bound, in operating its railway on its own land, to sound a whistle or ring a gong or do anything else for the purpose of warning persons lawfully crossing the line of the approach of a car, unless the place of crossing was a highway crossing; but the case does not in my opinion, support that contention. In order to understand the meaning and effect of the decision it is necessary to consider the facts to which it was applied.

The accident which led to the bringing of the action occurred in the village of Forest, at a point where a highway called Main street was crossed by the defendants' railway, and by the statement of claim statutory negligence in running the train by which the injuries complained of were caused faster than six miles an hour, without proper fencing, was charged, and common law negligence in proceeding at a reckless rate of speed, without warning or precautions against injury to the public, was also charged.

At the trial, questions were put to the jury, and their answers, so far as they bear upon the questions decided by the Court, were as follows:—

Q. (3) Is the Main street crossing at Forest in a thickly populated portion of the village? A. Yes.

Q. (4) At what rate of speed was the engine running at the time it crossed Main street? A. About 20 miles an hour.

Q. (5) Was such a rate of speed, in your opinion, a dangerous rate of speed for such locality? A. Yes.

Q. (6) Was the death of Mrs. McKay and the injury to Joseph McKay caused in consequence of any neglect or omission of the company? If so, what was the neglect or omission, in your opinion, which caused the accident? A. (a) Yes. (b) Neglect in running too fast and for the neglect of a flagman or gates.

Q. (6a.) Was any warning given by Hallisey (a watchman stationed at the crossing by the council of the municipality) to Mrs. McKay of the approach of the engine? A. Not sufficient.

Upon these and the other answers judgment was directed to be entered for the plaintiff, and the judgment was upheld by the Court of Appeal (1903), 5 O.L.R. 313, upon the ground that, as there was no fence across the highway, the defendants, by running the engine which caused the accident at the rate of speed found by the jury, were guilty of a violation of sec. 259 of the Railway Act of 1888 (Canada) which provided that "no locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town or village at a speed greater than six miles an hour unless the track is properly fenced in the manner prescribed by this Act.

The Supreme Court of Canada took a different view of the meaning of sec. 259, and held that in order that the defendants should be exempt from the restriction as to the rate of speed which it imposes it was not necessary that there should be fences across the highway, but that all that was required was that "the fences on both sides of the track should be turned in to the cattle guards so as to allow of the safe passage of trains," as prescribed by sec. 197, as amended by 55 & 56 Viet. ch. 27, sec. 6, and that, as that had been done on Main street,

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no restriction as to the rate of speed was imposed by sec. 259 on the defendants.

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Having come to that conclusion, it was necessary for the Court to consider whether the plaintiff's judgment could be supported upon the ground that, as found by the jury, the train was being run at an excessive and dangerous rate of speed, and in the absence of a flagman or gates at the crossing. The conclusion to which the Court came was that, in the absence of legislation on the subject, "the rate of speed at which the train could run across the level highway crossing was a matter solely for the determination of the Railway Committee" (i.e., the Railway Committee of the Privy Council), "as was also the determination of the kind, character and extent of the protection which, either by gates, watchman or otherwise, should be provided for the travelling public" (p. 101); and that it was not competent for a jury, by holding a company liable in damages for injuries sustained owing to its not having provided safeguards which, in the opinion of the jury, ought to have been provided, in effect to impose upon the company the duty of providing these safeguards. (See also p. 97).

In stating his opinion Sedgewick, J., said: "The question is, whether the common law requires the company to warn travellers of approaching trains by other and more effective means than those the statute requires" (p. 90); and, referring to the care imposed by the common law upon a railway company to avoid a collision with persons using the highway crossing for their vehicles, he said: "But the care imposed upon the company is in operating its trains; in so transacting its business, in the exercise of its right of way, as not to injure others in the exercise of their similar right, provided the latter exercise due care on their part. This relates to the mode of operating the trains and all other things done by the company in the transaction of its business. It does not require the company to employ men to keep travellers off the track, nor to serve notices upon them that trains were approaching" (p. 91).

There is nothing in the reasons for judgment or in the decision itself which requires us to hold that, in the circum-

stances of this case, the appellant was not guilty of actionable negligence in failing to give warning by bell or whistle of the approach of the car which came into collision with the waggon. The car was being run at a speed of about 20 miles an hour. There was nothing unlawful or negligent in that, but the servants of the appellant who were operating the car knew or ought to have known that it would have to pass over the crossing from Carpenter's premises; that persons might be coming out by the driveway with their vehicles; that, owing to the trees, it would be impossible to see any one coming out until the car had almost reached the crossing; and that, travelling at the rate of 20 miles an hour, it would be impracticable to stop the car in time to prevent injury to a person coming out whose vision of the approaching car would be obstructed until he had almost come to the railway and who might have reached the tracks before becoming aware that the car was approaching. To have run the car, in these circumstances, without, as the jury has found, giving any warning by bell or whistle of its approach, warranted the jury in finding that the appellant was guilty of negligence which caused the accident.

It may be that, if the crossing had been a highway crossing, the *McKay* case would have applied, because in the case of such a crossing the Railway Act prescribes what the duty of the railway company as to it is, and the warning which is to be given by approaching trains; and, according to that case, it is not competent for a jury to add to these safeguards others which the jury may think ought to have been provided.

For these reasons, I would dismiss the appeal with costs.

MACLAREN and MAGEE JJ.A., concurred.

HODGINS, J.A.:—Both the cases of *Grand Trunk R.W. Co. v. McKay*, 34 S.C.R. 81, and *Bell v. Grand Trunk R.W. Co.*, 48 S.C.R. 561, deal with highway crossings and the legislation applicable thereto, and establish that trains may cross highways properly protected under the statute or pursuant to the orders or directions of the Railway Committee or Railway Board, at a greater rate than 6 miles an hour.

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The *Bell* case can only be read as applicable to highway crossings, although what the jury found was excessive speed through a thickly populated district; the Court apparently treating it as a finding referable to sec. 275, sub-sec. 3, although it dealt only with the conditions under sec. 275 (1), regarding unfenced portions of cities, towns, or villages.

Neither of these cases assists in the determination of the question raised here, for the reason that the rule laid down in them is expressly limited to highway crossings as affected by legislation, and because this accident did not happen in a thickly peopled portion of a city, town, or village.

I agree with my Lord the Chief Justice that the appellant company was properly held liable under the circumstances of this case, and concur in dismissing the appeal.

Appeal dismissed.

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PARKS v. SIMPSON.

March 15.

Judgment—Action on—Limitation of Right—Damages for Breach of Directions in Judgment.

To be available as a cause of action, a judgment must be a definitive personal judgment for the payment of money, final in its character, and not merely interlocutory, remaining unsatisfied and capable of immediate enforcement—a judgment of a character which would have supported an action of debt under the old forms of procedure.

And where the judgment upon which the plaintiff sued was not a judgment for the payment of a sum of money, either certain or uncertain—and the action was in reality an action to recover damages for an alleged breach by the defendant of the directions of the judgment sued upon, in that the defendant did not, as the judgment directed, permit the plaintiff to remove his bees and honey from the defendant's land, whereby the bees died and the honey became useless—it was *held*, that the action did not lie.

Judgment of the County Court of the County of Hastings affirmed.

APPEAL by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Hastings dismissing an action brought in that Court and tried by him without a jury.

The action was for damages for non-performance of the

judgment pronounced by the Court in two former actions and for the failure of the defendant to comply with the directions thereof.

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February 8 and 9. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

F. E. O'Flynn, for the appellant, argued that the action properly lay against the defendant for non-compliance with the judgment recovered in the County Court directing him to deliver the bees and honey in question to the plaintiff, and in support of his contention he cited *Aldrich v. Aldrich* (1893), 23 O.R. 374, 24 O.R. 124.

E. G. Porter, K.C., for the defendant, respondent, contended that an action did not lie on an interlocutory judgment, such as the one here. The only kind of judgment on which an action would lie would be a personal one for payment of an express sum of money: *Cyc.*, vol. 23, pp. 1503, 1504.

March 15. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment of the County Court of the County of Hastings, dated the 17th December, 1914, which was directed to be entered by the Senior Judge of that Court, after the trial before him, sitting without a jury, on the 12th of that month.

The amount of litigation in which the parties have indulged over a comparatively trifling matter is little less than shocking. The original dispute was as to whether the price at which the appellant purchased from the respondent's testator 53 skips or hives of bees was \$200 or \$110, which was further complicated by a claim by the appellant for damages for the detention of some boxes and other articles which he had brought to the deceased's farm for the purpose of his taking care of the bees and the honey they made until the time arrived when they were to be taken by the appellant, and which, as he alleged, the deceased had prevented him from doing.

Two actions were brought, one by the deceased for the recovery of the balance which he claimed to be due to him on the

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purchase, and to enforce, by sale of the bees, a lien which he claimed upon them for this balance; and the other by the appellant, alleging that he had purchased the bees for \$110, and that the property in them had passed to him, and claiming \$50 damages for his services in "caring, nursing, and attending to" the bees, and a return of the articles he had brought to the deceased's farm, or their value, and \$50 as damages for their detention, and in the appellant's action he alleged that the deceased had repudiated and cancelled the sale of the bees and the bargain he had made in connection with them.

Besides bringing his own action, the appellant counterclaimed in the deceased's action for the return of his goods and chattels, or for the value of them, and "damages for their conversion and detention."

The two actions were tried together before the Senior Judge, sitting without a jury, on the 11th June, 1912, and by the judgment which he pronounced on the 19th of that month it was ordered and adjudged that the appellant "was entitled to a return of all his bees and honey and other chattels brought upon the" deceased's "property for the purpose of working the hives and caring for the honey" and \$25 damages for their detention: that the deceased was entitled to \$165, "balance of the purchase-money," with interest thereon at five per cent. from the 15th day of May, 1911, until judgment; that the appellant should pay into Court that sum and interest, less the \$25 damages, "whereupon" he should "be permitted to remove from the premises" of the deceased his goods and chattels which are enumerated, "together with the bees and honey bought by him from the" deceased; and that, immediately after such removal, the money paid into Court should be paid to the respondent; and each party was left to bear his own costs.

From this judgment the appellant appealed to a Divisional Court of the High Court of Justice, and on the 29th November, 1912, his appeal was dismissed with costs, the Court being of opinion that the Court below had done substantial justice: *Parks v. Simpson, Simpson v. Parks* (1912), 4 O.W.N. 422.

A motion was made by the respondent to the Divisional

Court to vary the minutes of its judgment, and was dismissed without costs on the 8th February, 1913: *ib.* (1913), 4 O.W.N. 829. The report does not shew the nature of the motion, but it was probably for the same relief that was subsequently obtained from the Senior Judge, when, upon the petition of the respondent, and on the 30th August, 1913, an order was made amending the judgment by providing that, if the appellant did not pay into Court the money he was ordered to pay in, within 30 days from the 30th August, 1913, the respondent might issue execution for the amount against the goods and lands of the appellant, and the appellant was ordered to pay the costs of the application.

This application was opposed by the appellant, who filed, among other affidavits, an affidavit of his own, in which it was stated that on a visit to the farm of the deceased on the 13th August, 1913, he found only 3 colonies of bees alive out of the 53 that he had bargained for, and that the rest were dead.

The appellant paid the money into Court on the 13th or 15th September, 1913, and on the following 11th November, it was paid out to the respondent, on her application, supported by her affidavit sworn on the 10th November, 1913, in which she deposed that the appellant had taken away from her premises all the articles which he had brought there, and "all the property and goods purchased by him" from the deceased or made by the bees "except 50 boxes which the appellant then examined and would not take away, saying they were no use to him."

The present action is brought, as the reply and joinder of issue states, to recover "damages for non-performance of the judgment pronounced by the Court" (i.e., in the former actions) "and for failure of the defendant to carry out the same."

It appears from the reasons for judgment of the learned Senior Judge that his view was that there was no new evidence which might not have been given at the former trial, and that the appellant had "no rights in this action as to any damages accruing before the 19th June, 1912, which were not adjudicated upon in that trial and settled by that judgment;" and that, as to any damage since that date, the appellant "had the right

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under that judgment to remove his goods and chattels immediately upon payment by him of the amount found owing to Simpson;" and that, "if he suffered any damage by reason of the goods and chattels remaining in the possession of Simpson after that date, it was his own fault;" and the action was therefore dismissed with costs.

It appears from the testimony of the appellant in this action that he has got back all the goods and chattels which he brought to the deceased's farm, except 5 top boxes, and that his claim is for damages for the loss of the bees, which, as he alleges, came to their death owing to the negligence of the deceased, and for the loss of some of the honey which they had made, which had "candied" on the deceased's farm and had become practically valueless.

The evidence as to the 5 top boxes which the appellant testified he had not got back was not satisfactory, and the proper conclusion is, I think, that he was not prevented by the respondent from taking them away, and that if he did not get them it was his own fault.

The extent of the appellant's right as to the bees and honey is to be measured by the judgment in the former actions, and is that, upon payment into Court of the \$165, and interest, less the \$25 damages awarded to him, he was to be permitted to remove them from the premises of the deceased; and all other questions are, in my opinion, concluded by the judgment.

It is unnecessary, in the view I take, to express any opinion as to whether the loss occasioned by the death of the bees and the spoiling of the honey falls upon the appellant or upon the respondent. The rights, if any, which the appellant may have must be sought and obtained in the Court by which the judgment was pronounced.

It is only a judgment for the payment of money upon which an action may be brought; that, to be available as a cause of action, a judgment must be a definitive personal judgment for the payment of money, final in its character, and not merely interlocutory, remaining unsatisfied and capable of immediate enforcement, is settled law. Cyc., vol. 23, pp. 1503-4, and the

authorities there cited, support this statement of the law. See also *Seligman v. Kalkman* (1860), 17 Cal. 153; *Smith v. Kander* (1894), 58 Mo. App. 61.

The theory upon which it was held that an action of debt might be brought upon a judgment was that, upon its being shewn that a judgment is "still in force and yet unsatisfied, the law immediately implies that by the original contract of society the defendant hath contracted a debt, and is bound to pay it:" Blackstone's Commentaries, Lewis's ed., book 3, pp. 159, 160.

A debt which is properly enforceable by an action of debt must be a sum of money due by certain and express agreement where the amount is fixed and specific, and does not depend upon any subsequent valuation to settle it; and, if the contract is to be discharged by the delivery of stock, merchandise, or other articles of trade or value, the action cannot be maintained: Cyc., vol. 13, pp. 403, 407, 409; and, although forms of action have been abolished, it is still necessary to found an action upon a judgment that the judgment be of a character which would have supported an action of debt under the old forms of procedure.

The judgment upon which the appellant sues is not a judgment for the payment of a sum of money, either certain or uncertain, but the action is in reality an action to recover damages for an alleged breach by the respondent of the directions of the judgment in not permitting the appellant to remove his bees and honey; and such an action does not lie.

It may not be amiss to point out that, even where the action lies, it was said more than 150 years ago in *Bowen v. Barnett* (1754), Sayer 160, 161: "As there is a degree of vexation in bringing an action of debt upon a judgment, such an action ought not to be favoured." And Blackstone says: "Wherefore, since the disuse of those real actions, actions of debt upon judgment in personal suits have been pretty much discountenanced by the Courts, as being generally vexatious and oppressive, by harassing the defendant with the costs of two actions instead of one:" Blackstone's Commentaries, Lewis's ed., book 3, p. 160. And as late as 1899 a very eminent Judge said: "But,

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In my opinion, the appeal should be dismissed with costs.

[APPELLATE DIVISION.]

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 March 15.

GARSDIE V. GRAND TRUNK R.W. CO.

Railway—Level Highway Crossing—Person Killed by Engine—Negligence—Failure to Give Warning—Gates Erected without Authority or Direction of Board of Railway Commissioners—Person Going upon Portion of Highway between Gates when down—Exclusive Right of User—Railway Act, R.S.C. 1906, ch. 37, sec. 279—Contributory Negligence—Question for Jury.

Where in the case of a Dominion railway it is not shewn that the erection of gates at a level highway crossing is authorised or required by an order or direction of the Board of Railway Commissioners for Canada, the lowering of the gates is but a warning to persons desiring to cross the tracks that it is dangerous to do so. The railway company has not, by virtue of sec. 279 of the Railway Act, R.S.C. 1906, ch. 37, or otherwise, the exclusive right of user of that part of the highway within the gates, when the gates are down.

Meaning and effect of sec. 279 explained.

Wyatt v. Great Western R.W. Co. (1865), 34 L.J.Q.B. 204, distinguished. The entry of a person upon the portion of the highway between the gates, when the gates are down, is not, as a matter of law or *per se*, negligence disentitling him to recover damages for injuries sustained by him while upon that portion of the highway, by reason of the negligence and breach of statutory duty of the railway company: it is a question for the jury to decide whether, in all the circumstances, he was guilty of contributory negligence.

Review of the American authorities.

APPEAL by the defendant company from the judgment of BRITTON, J., at the trial, upon the findings of the jury, in favour of the plaintiff, in an action brought under the Fatal Accidents Act to recover damages for the death of Walter Joseph Garside, which was caused, as the plaintiff alleged, by the negligence of the defendant company.

The deceased was run down by a yard engine of the defendant company, which was backing across Wellington street, in

the city of London, without having a man stationed upon it to warn persons about to cross, and without, as the jury found, any bell having been rung, before it began to cross the street, to give warning that it was about to move. The gates at Wellington street were down when the deceased reached the crossing, walking north on the east sidewalk, but he passed around or under them, and was standing between two of the tracks when he was struck. The jury found that he was not guilty of contributory negligence.

February 22. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, J.J.A.

D. L. McCarthy, K.C., for the appellant company. The deceased got upon the tracks after the gates were down, and so took all the risks: *Fewings v. Grand Trunk R.W. Co.* (1909) 1 O.W.N. 1. While the gates were down, the public had no right to use the part of the highway between them; the entrance of the deceased was a trespass, and he was guilty of negligence which disentitled the respondent to recover: *Wyatt v. Great Western R.W. Co.* (1865), 34 L.J.Q.B. 204. Section 279 of the Dominion Railway Act, R.S.C. 1906, ch. 37, has the same effect as the section considered in the *Wyatt* case. See also sec. 30(g). The finding against contributory negligence cannot stand. The deceased's own recklessness in going upon the tracks was the cause of the disaster: *Cleary v. Philadelphia and Reading R.R. Co.* (1891), 140 Penn. St. 19; *Granger v. Boston and Albany R.R. Co.* (1888), 146 Mass. 276; *Hatch v. Lake Shore and Michigan Southern R. Co.* (1913), 156 N.Y. App. Div. 394; Thompson on Negligence, 2nd ed. (1901), vol. 2, para. 1532, p. 209. The plaintiff was on the property of the railway company, and hence he was a trespasser: *Jones v. Grand Trunk R.W. Co.* (1888), 16 A.R. 37, affirmed by the Supreme Court of Canada (1889), 18 S.C.R. 696.

Sir *George Gibbons*, K.C., and *G. S. Gibbons*, for the plaintiff, respondent. *Wyatt v. Great Western R.W. Co.*, *supra*, may be distinguished as being governed by an English statute. In this case the company was bound to give the statutory warning,

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i.e., ringing a bell, which it failed to do. In any event, there is ultimate negligence here: *Samkiwicz v. Atlantic City R.R. Co.* (1911), 81 Atl. Repr. 833; *Canadian Pacific R.W. Co. v. Hinrich* (1913), 48 S.C.R. 557. As to contributory negligence, see *Chicago and Eastern Illinois R.R. Co. v. Keegan* (1904), 112 Ill. App. 338; *Chicago and Western Indiana R.R. Co. v. Ptacek* (1898), 171 Ill. 9; *Long v. Toronto R.W. Co.* (1914), 50 S.C.R. 224; *Grand Trunk R.W. Co. v. McAlpine*, [1913] A.C. 838.

March 15. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment, dated the 13th January, 1915, which was directed to be entered by Britton, J., on the findings of the jury, at the trial before him, at London, on that and the previous day.

The action is brought to recover damages under the Fatal Accidents Act, for the death of Walter Joseph Garside, which was caused, as the respondent alleges, by the negligence of the appellant.

The deceased was run down by a yard engine of the appellant, which was backing across Wellington street, in the city of London, without having a man stationed upon it to warn persons standing on or crossing or about to cross the track of the railway, and without, as the jury found, any bell having been rung before it began to cross the street to give warning that it was about to move.

Wellington street, which runs north and south, is crossed by six tracks of the appellant's railway, and there are gates at the crossing, which, when let down, extend from the east end of the sidewalk on the east side of the street to the west end of the sidewalk on the west side. The south gates are situate about 25 feet south of the south track, and the north gates are 10 or 15 feet north of the north track. The gates were down apparently because a freight train was moving eastward on the fourth track from the south. When the deceased, who was proceeding on foot and going north on the east sidewalk, came to the gates, he passed around or under them on that side of the street

and walked diagonally to the west sidewalk and stood on the space between the second and third tracks, a little off the west sidewalk and to the west of it, waiting for the freight train to go by, when he was struck by the yard engine.

As I have said, the freight train was moving eastward on the fourth track, and the yard engine was standing with its rear end about on the east line of Wellington street; when the yard engine was moving, the deceased, who had not observed that it was moving, stepped a little closer to the fourth track, and was struck by the yard engine and killed. There was nothing on any of the other tracks except some "dead" cars standing on one of them.

The findings of the jury, except the one which exonerated the deceased from contributory negligence, were not challenged by the learned counsel for the appellant; but he contended that, when the gates were lowered, the right of the public to use the highway between them was suspended, and that the deceased in entering on that part of the highway was a trespasser, to whom the appellant owed no duty; or that his so entering was, in the circumstances of the case, as a matter of law or *per se*, negligence disentitling the respondent to recover.

It was not proved that the gates were erected or maintained in pursuance of any order or direction of the Board of Railway Commissioners for Canada, nor is there any statutory authority requiring or authorising the erection or maintenance of them, and in this respect the case of *Wyatt v. Great Western R.W. Co.*, 34 L.J.Q.B. 204, referred to by Mr. McCarthy, differs from the case at bar.

In that case railway companies were required by sec. 47 of the Railway Clauses Consolidation Act (1845), where the railway crosses a turnpike road or a public carriage road on a level, to erect and maintain sufficient gates across the road on each side of the railway and to employ proper persons to open and shut the gates; and by the section it was also provided that the gates should be kept constantly closed except during the time when horses, cattle, carts or carriages passing along the road should require to cross the railway; that the gates should

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be of such dimensions and so constructed as when closed to fence in the railway and prevent cattle or horses passing along the road from entering upon the railway; and that the persons entrusted with the care of the gates should cause them to be closed so soon as such horses, cattle, carts or carriages, should have passed through the gates, under a penalty of 40s. for every default therein.

It was held by the Court, Blackburn, J., dissenting, that the effect of this legislation was to prohibit members of the public to open the gates or to pass across the railway, except where the gates were opened by the persons whose duty it was to open them, and that the plaintiff was guilty of an illegal act by opening the gates and attempting to pass through with his horse and carriage, though there was no servant of the railway company there to open the gates, and the plaintiff had waited a reasonable time for him to come and open them; and the view of the Court was, also, that the effect of sec. 47 was to make the road a highway only when the gates were opened by one of the company's servants.

It was further argued by counsel for the appellant that sec. 279 of the Railway Act (R.S.C. 1906, ch. 37) has the same effect as the section under consideration in the *Wyatt* case; but I am not of that opinion. Section 279* is a prohibitive section, designed to prevent a railway company, in carrying on the operations mentioned in it, from unnecessarily or unreasonably obstructing the traffic upon highways which its railway crosses, and does not confer upon the company any exclusive right to the use of that part of a highway upon which its tracks are laid during the time which the section allows for the operations with which it deals.

No case was cited which supports the contention of the appellant with which I am now dealing, although there are ex-

*279. Whenever any railway crosses any highway at rail level, the company shall not, nor shall its officers, agents or employees, wilfully permit any engine, tender or car, or any portion thereof, to stand on any part of such highway, for a longer period than five minutes at one time, or, in shunting to obstruct public traffic for a longer period than five minutes at one time, or, in the opinion of the Board, unnecessarily interfere therewith.

pressions to be found in the reasons for judgment in the American cases to which I shall afterwards refer, which appear to indicate that, in the view of the Courts, a railway company has the exclusive right of user of that part of the highway within the gates, when it has erected and maintains gates across the highway, and the gates are down.

In my view, that is not the law in this Province, at all events where in the case of a Dominion railway it is not shewn that the erection and maintenance of the gates is authorised or required by an order or direction of the Board of Railway Commissioners for Canada, and the lowering of the gates is but a warning to persons desiring to cross the tracks that it is dangerous to do so.

I am also of opinion that the other contention of the appellant's counsel is not well-founded. It is, no doubt, supported by decisions of the highest Courts of some of the States of the neighbouring Republic, and among them the Courts of Massachusetts, New York, and Illinois, but it is opposed to the view of the highest Courts of other States.

Among the cases which support the appellant's contention are *Granger v. Boston and Albany R.R. Co.*, 146 Mass. 276; *Cleary v. Philadelphia and Reading R.R. Co.*, 140 Penn. St. 19; and *Hatch v. Lake Shore and Michigan Southern R. Co.*, 156 N.Y. App. Div. 394; and in Thompson on Negligence, 2nd ed., vol. 2, para. 1532, it is said that "the fact that the gates are lowered is a plain warning to every traveller approaching the crossing that it is unsafe to attempt to cross. If, in disregard of this warning, a pedestrian passes the gate in broad daylight, and enters upon the crossing, and, while watching one train, is struck by another and killed, his death will be attributed to his own recklessness, and it cannot be made the ground of recovering damages."

Among the cases in which a different view was taken are *Chicago and Western Indiana R.R. Co. v. Ptacek*, 171 Ill. 9, in which it was held that, although an act of imprudence, it is not negligence *per se* in every case, as a matter of law, for a person to attempt to cross a railway track in front of an approaching

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train when the crossing gates are down, and *Samkiwicz v. Atlantic City R.R. Co.*, 81 Atl. Repr. 833, in which it was held by the Court of Errors and Appeals of New Jersey that "it is not a sound legal proposition that the mere attempt of one on foot to cross over a railroad track at a highway crossing when the gates are down, in doing which he is injured, raises a conclusive presumption that 'he took all chances of the injury and cannot recover.' That the gates are closed is a circumstance to be taken into account in determining whether, under all the facts, he was negligent in not observing the warning conveyed, but it does not conclusively convict him of contributory negligence" (p. 834). And the same view was adopted by McLennan, P.J., who dissented from the decision of the Court in *Hatch v. Lake Shore and Michigan Southern R. Co.*, *supra*.

The reasoning of the Courts in the cases which are opposed to the appellant's contention commends itself to me as sound and preferable to that which led to the opposite conclusion; and, in my opinion, the fact that the deceased went upon the highway between the gates when they were lowered was not in itself sufficient to disentitle the respondent to recover; it was not *per se* negligence, and the learned trial Judge ought not to have instructed the jury that as a matter of law the deceased was guilty of contributory negligence; the lowering of the gates was a warning to the deceased that it was dangerous to cross the tracks, but it was a question for the jury to decide whether, under all the circumstances, he was guilty of contributory negligence.

I would dismiss the appeal with costs.

[APPELLATE DIVISION.]

CHRISTIE V. LONDON ELECTRIC CO.

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Jan. 22.
March 15.

Master and Servant—Death of Servant—Lineman Climbing Pole—Decayed Condition—Concealment of—Negligence—Contributory Negligence—Inspection—Evidence—Findings of Jury—Supplemental Finding of Appellate Court.

C., an experienced lineman, employed by the defendant company, was engaged, under the superintendence of a foreman, in the work of removing the wires and cross-arms from old poles, which were to be taken down. New poles had been erected close to the old ones. C. ascended one of the old poles, and, noticing that it was shaky, gave it "a little teeter" to shew that it was so. The pole began to move as if it were about to fall, and C. jumped for the nearest new pole, missed it, fell to the ground, and was killed. The old pole was afterwards found to be decayed at the butt; the decay was concealed by heaped-up earth, and there was nothing to indicate that it was unsafe to climb the pole. It was established beyond question that C. came to his death while in the performance of a duty which he was called upon to perform, and that, apart from contributory negligence, his death was occasioned by the condition of the pole. There was evidence from which it might be inferred that it was improper for C. to climb the old pole before it had been lashed to the nearest new pole; but ropes for lashing had not been provided. In an action under the Fatal Accidents Act, to recover damages for the death of C., the jury found: (1) that the defendant company was guilty of negligence which caused the death of C.; (2) that the person guilty of negligence was the company's pole inspector; (3) that his negligence was "in reporting pole to be in a fair condition, when from the evidence produced it was shewn pole was rotten and had been for some time, and quite unsafe for a man to work on;" (4) that C. could not, by the exercise of reasonable care, have avoided the accident:—*Held*, having regard to the facts and circumstances in evidence, that it was impossible to say that the finding that C. was not guilty of contributory negligence was one that twelve reasonable men might not have made.

Putting the company's case on the highest ground, C. was chargeable only with disregarding a practice, not a rule, of his employer, in not seeing that the two poles were lashed together before he climbed the old pole; and the mere fact of his disregard of the practice would not have warranted the trial Judge in withdrawing the case from the jury.

Randall v. Ahearn & Soper Limited (1904), 34 S.C.R. 698, applied.

Held, also, that the findings of the jury were sufficient to entitle the plaintiff to judgment; and, if not, the Court ought to exercise the power it possessed and find the facts to supply what the jury had omitted to find, if the evidence warranted such a finding: the findings of the jury standing, there was no difficulty in concluding that, if there had been a proper inspection, the true condition of the old pole would have been discovered, and there would have followed from the discovery a duty on the company's part to give warning to C. of the condition of the old pole; instead of that being done, it was classed as a fair pole; and what would have disclosed to C. that it was not a fair pole was concealed from him by the act of the company in heaping up earth around the butt.

Judgment of BRITTON, J., affirmed.

ACTION under the Fatal Accidents Act to recover damages for the death of John Christie, which, it was alleged by the

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plaintiff, was caused by the negligence of the defendant company.

January 14. The action was tried before BRITTON, J., and a jury, at London.

Sir *George Gibbons*, K.C., and *G. S. Gibbons*, for the plaintiff.

D. L. McCarthy, K.C., and *W. R. Meredith*, for the defendant company.

January 22. BRITTON, J.:—The husband of the plaintiff was killed by a fall from a pole of the defendant company, which pole the deceased had climbed up for the purpose of removing wires, as the pole was no longer considered by the defendant company fit for service, and a new pole had been erected near to the old one.

The plaintiff charges negligence in sending an employee up this pole when in a defective condition—in not having guy ropes to be used in such a way as to prevent the pole from falling.

The plaintiff further says that, if the defective condition of the pole was not known, and if the pole was considered a fair pole, the defendant company was guilty of negligence in its want of proper inspection.

There was very little evidence given at the trial. The defendant company called no witnesses.

At the close of the plaintiff's case, the counsel for the defendant company asked for a dismissal of the action. I reserved my decision, and submitted questions to the jury, which were answered as follows:—

That the defendant company was guilty of negligence which occasioned the death of John Christie.

That the negligence was that of the pole inspector "in reporting pole to be in a fair condition, when from the evidence produced it was shewn pole was rotten and had been for some time, and quite unsafe for a man to work on."

The damages were assessed at \$2,500.

Further consideration of the motion for a nonsuit leads me

to the conclusion that the case could not properly have been withdrawn from the jury, so I must direct judgment for the plaintiff for \$2,500, with costs, apportioning the money, one half to the widow, one quarter to each of the two children, viz., John Roy and Edith Christie; the infants' money to be paid into Court.

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The defendant company appealed from the judgment of BRITTON, J.

February 22. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

D. L. McCarthy, K.C., and *W. R. Meredith*, for the appellant company, argued that the learned trial Judge should have withdrawn the case from the jury at the close of the plaintiff's case, and that their finding that the deceased was not chargeable with contributory negligence was not justified by the evidence.

Sir *George Gibbons*, K.C., and *G. S. Gibbons*, for the plaintiff, respondent, argued that the case could not have been withdrawn from the jury, and that their findings entitled the respondent to judgment. If the findings were insufficient, the evidence would warrant a supplemental finding of the Court, as in *Phillips v. Canada Cement Co.* (1914), 6 O.W.N. 185.

March 15. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment, dated the 22nd January, 1915, which was directed to be entered by Britton, J., on the findings of the jury, at the trial before him at London on the 14th day of that month.

The action is brought under the Fatal Accidents Act, to recover damages for the death of John Christie, which, it is alleged, was caused by the negligence of the appellant.

The main facts are not in controversy, and are as follows. The deceased was an experienced lineman, and had been employed by the appellant for several years. On the 28th July, 1914, the day upon which he met his death, he and three fellow-employees were working under the superintendence of John McKeown, their foreman. The appellant had decided to remove

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some of its poles on Dundas street, in the city of London, and some time before had erected new poles, which were intended to replace the poles that were to be removed, and these new poles were erected close to the old ones. The poles were fourteen or fifteen inches in diameter at the butt, and the distance from the centre of the new pole to the centre of the one which was to be removed was about two and a half feet. The poles were not straight, but bent out near their tops, so that the distance between them at the top was between four and five feet. The wires and cross-arms had not been removed from the old poles, and it was for the purpose of removing them that the deceased and his fellow-employees were there. The deceased ascended one of the poles which were to be removed, and, before commencing to cut the wires that were attached to it, noticed that it was shaky, and called out to one of the men, Morris by name, who was on the ground, that he did not think the pole was safe, and at the same time, to shew that it was shaky, gave the pole "a little teeter, a shake." Morris called back to him not to cut the wires until he (Morris) had called the foreman. The pole commenced to move as if to fall towards the street, when the deceased jumped for the new pole, but failed to catch it with his hands, although his spurs caught it; and he fell to the ground and was instantly killed. The foreman, McKeown, was at the time upon the ground about one hundred and twenty feet away from the pole.

Upon an examination of the pole after the accident, it was found that it was badly decayed at the butt, close to the ground, and there was a hole in it on the side towards the street into which a man's hand could be put. This condition of the pole was not observable at the time of the accident, on account of the earth that had been left over after the erection of the new pole having been heaped up at the butt of the old pole to the height of about a foot and left there, concealing the hole.

There was nothing, as far as the evidence shewed, to indicate that the pole which the deceased had climbed was decayed, or that it was not safe to climb it, except in so far, if at all, as the fact that it was about to be replaced by a new pole was evidence of it.

The witness Morris testified that, owing to the distance between the two poles at the top, it would have been, if not impracticable, at least difficult, for the deceased, if he had gone up the new pole, from his position on it to have removed the cross-arm. Morris also gave evidence which, it was argued, shewed that it was improper for the deceased to climb the old pole, or, if he went up it, to have done so before the two poles had been lashed together.

If the course taken by the deceased was an improper one, it is somewhat singular that he was not prevented from taking it by the foreman McKeown, who had the oversight of the deceased and the men who were working with him, and was only a short distance away from the pole which was climbed by the deceased. It was also in evidence that there were no ropes for lashing the poles together provided for the work the deceased and his fellow-workmen were doing.

The jury, in answer to questions, found:—

(1) That the appellant was guilty of negligence which caused the death of Christie.

(2) That the person who was guilty of negligence was the appellant's pole inspector.

(3) That his negligence was "in reporting pole to be in a fair condition, when from the evidence produced it was shewn pole was rotten and had been for some time, and quite unsafe for a man to work on."

(4) That the deceased could not, by the exercise of reasonable care, have avoided the accident.

And upon these findings the trial Judge directed that judgment should be entered for the respondent for the sum at which the jury assessed the damages.

There was, I think, evidence to warrant the conclusion that the pole which the deceased climbed had been inspected by some one appointed by the appellant to make the inspection, and that he was negligent in making the inspection and reporting that the pole was in fair condition, when even a superficial examination would have shewn that it was not in any such condition, but, as the jury found, was rotten and quite unsafe for a

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man to work on, and the jury's view evidently was that, if the inspector had done his duty and the appellant its duty, there should have been something put upon the pole to indicate that it was unsafe to climb upon it, or that the deceased should have been warned of the true condition of the pole and of the danger he would incur if he climbed on it, and that, instead of doing this, the dangerous condition of the pole was concealed from the deceased by the earth which had been heaped up at the butt of it by the servants of the appellant.

That the deceased came to his death while in the performance of a duty which he was called upon to perform, and that, apart from the question of contributory negligence, his death was occasioned by the condition of the pole is, I think, beyond question.

The question as to the deceased having climbed the old pole and having done so without seeing that it had been lashed to the new pole, and as to the giving way of the old pole having been caused by the deceased shaking it, were questions bearing on the issue as to contributory negligence, and the jury has acquitted the deceased of that.

There were circumstances that probably weighed with the jury in reaching that conclusion, and among them the following: the improbability of the deceased, who, as I have mentioned, was an experienced lineman, risking life or limb if he thought there was danger to be apprehended from climbing the old pole; the fact that the dangerous condition of the old pole was concealed, and that it was classed as a fair pole; the fact that it was impracticable, or at all events difficult, for him to have removed the cross-arm if he had climbed the new pole; the fact that there were no ropes or wires provided for lashing the two poles together; and the fact that the foreman was upon the ground superintending the work and made no objection to the deceased climbing the old pole; and it is, in my opinion, impossible to say that the finding that the deceased was not guilty of contributory negligence was one that twelve reasonable men might not have made.

The principle of the decision of the Supreme Court of Canada

in *Randall v. Ahearn & Soper Limited* (1904), 34 S.C.R. 698, is, I think, applicable. In that case the plaintiff, who was an employee of the Ottawa Electric Light Company, was engaged for his employers in placing a transformer upon a telegraph pole, to which the defendants had attached wires for carrying power from the electric light lines to buildings which the defendants desired to illuminate, when his hands touched the ends of a tie wire, which was not insulated, by which he received a shock, and, falling to the ground, was seriously injured. A rule of the electric light company directed every employee whose work was near apparatus carrying dangerous currents to wear rubber gloves, which would be furnished on application, and the plaintiff was not wearing such gloves when he was hurt, and it was held that the mere fact of the absence of gloves was not such negligence on the plaintiff's part as would warrant the case being withdrawn from the jury.

Putting the appellant's case on the highest ground that it can be put, the deceased was chargeable only with disregarding, not a rule of his employer, but a practice, in not seeing that the two poles were lashed together before he climbed the old pole; and, if the disregard of the rule as to wearing rubber gloves did not warrant the case being withdrawn from the jury in the *Randall* case, I do not see how the mere fact of the disregard by the deceased of the practice as to lashing the poles together would have warranted my brother Britton's withdrawing this case from the jury.

There is more difficulty as to whether the findings of the jury were sufficient to entitle the respondent to have judgment entered for her; but, after much consideration, I have come to the conclusion that they were, if the findings of the jury are to be taken to mean what I have said I think they do mean; and this is a case in which, if the findings are insufficient, the Court ought to exercise the power it possesses and find the facts to supply what the jury has omitted to find, if the evidence warrants such a finding. If the answers of the jury to the first three questions and the finding as to contributory negligence stand, there is no difficulty in reaching the conclusion that, if

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there had been a proper inspection, the true condition of the old pole would have been discovered, and there would have followed from the discovery a duty on the appellant's part to give warning to the deceased of the condition of the old pole; but, instead of that being done, it was classed as a fair pole; and what would have disclosed to the deceased that it was not such a pole was concealed from him by the act of the appellant in covering with earth the hole at the butt of the pole.

It appears to me that the appellant is on the horns of a dilemma. If there was no inspection, it was guilty of negligence because, having regard to the age of the old pole and the other circumstances in evidence, it was the duty of the appellant to have inspected it, and there was a failure to perform that duty, the result of which was that the deceased was led to believe that it was safe to climb it; and his death was, therefore, occasioned by the negligence of the appellant. If, on the other hand, there was an inspection, and the person who inspected the old pole reported, contrary to the fact, that it was a fair pole, he was guilty of negligence which caused the accident, because, if he had ascertained the true condition of the pole and reported it, the duty of the appellant would have been to have warned the deceased of its condition.

Upon the whole, I am of opinion that the appeal fails and should be dismissed with costs.

[APPELLATE DIVISION.]

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SHARPE V. CANADIAN PACIFIC R.W. Co.

Nov. 2.

Master and Servant—Death of Servant—Workman Returning from Work—Course of Employment—Orders of Foreman—Railway—Findings of Jury—Evidence.

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S. was employed by the C.P. railway company as a lineman; he was paid for his work by the hour; he and other workmen were allowed to sleep in a car standing on the line of that company in the city of H. S. had been engaged, under the charge of a foreman, in the performance of his duties, at the town of W.; and, the work there being completed, the foreman, S. himself, and three others who had been engaged in the work, returned by train to H., arriving there about 9 p.m. The five men then began to walk along the railway track of another railway company in order to reach the sleeping-car; S. was overtaken by an engine of that railway company and killed. In an action brought under the Fatal

Accidents Act, against the two railway companies, to recover damages for the death of S., the jury at the trial made findings against both defendants. The trial Judge, BRITTON, J., gave judgment for the plaintiff against the employer-company, but dismissed the action as against the other company. The employer-company appealed:—

Held (reversing the judgment of BRITTON, J.), that there was no evidence to support the findings of the jury: the injury to S. was not sustained in the course of his employment; when his work at W. was done, his work for the day had come to an end, and he was no longer subject or bound to conform to the orders or directions of the foreman; even if it was the duty of S. to take to and leave at the sleeping car the tools he had been using at W., there was no evidence to support the conclusion that until that was done he was still subject to the orders or directions of the foreman.

Holness v. Mackay & Davis, [1899] 2 Q.B. 319, and *Walters v. Staveley Coal and Iron Co. Limited* (1910-11), 4 B.W. C.C. 89, 303, applied.

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ACTION against the Canadian Pacific Railway Company and the Toronto Hamilton and Buffalo Railway Company, brought under the Fatal Accidents Act, to recover damages for the death of Thomas L. Sharpe, caused, as the plaintiff alleged, by the negligence of the defendants or one of them.

September 14 and 15, 1914. The action was tried before BRITTON, J., and a jury, at Peterborough.

F. D. Kerr and *V. J. McElderry*, for the plaintiff,

J. D. Spence and *G. W. Wallrond*, for the defendant the Canadian Pacific Railway Company.

J. A. Soule, for the defendant the Toronto Hamilton and Buffalo Railway Company.

November 2, 1914. BRITTON, J.:—This action is brought on behalf of the father and mother of Thomas L. Sharpe, who was killed on the evening of the 19th March, 1913, on the track of the defendant the Toronto Hamilton and Buffalo Railway Company, by a light engine of that company, running reversely. At the close of the case for the plaintiff, and again at the close of the evidence, counsel for the defendants asked for dismissal of the action. I reserved my decision, and submitted questions to the jury, which the jury answered; and they assessed the damages at \$1,000.

The deceased was a lineman in the employment of the defendant the Canadian Pacific Railway Company, and on the day of his death had, with others, been working for the Can-

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adian Pacific Railway Company at Welland. That company had certain running rights on the railway of the Toronto Hamilton and Buffalo Railway Company; and the Canadian Pacific Railway Company had a car, called a boarding-car or sleeping-car, which the workmen could use, and, if it was used by the workmen, they were charged a certain sum agreed upon, which was deducted from their wages. This car was on a dead-end track in the north-western part of the yard of the Toronto Hamilton and Buffalo Railway Company.

On the morning of the accident, the deceased, with his boss and four other workmen, went to Welland to do some work. They had travelled part of the way upon a hand-car, then walked to the station of the Toronto Hamilton and Buffalo Railway at Hamilton, and taken a Canadian Pacific train for Welland. At the close of the day, they returned to Hamilton, and intended to go to the sleeping-car to stay all night. Upon arriving at the place where the hand-car had been left, they found that the hand-car had been removed. Then all started to walk to the sleeping or boarding-car. Just before the accident, all were walking on the track for east-bound trains.

At the place of the accident, there were three tracks, one for east-bound trains, one for west-bound trains; and the third track had upon it cars at rest. These men were walking westerly upon the east-bound track, when a train was seen approaching them from the west. The men all got off the east-bound track, stepping to the north upon the west-bound track. Four of them went further to the north and entirely off the west-bound track; but the deceased and one other continued to walk westerly upon the west-bound track, when they were overtaken and run over by the light engine running as mentioned above.

The deceased was not in the employment of the Toronto Hamilton and Buffalo Railway Company. He was not upon its tracks by any permission of that company, express or implied. There was no evidence of permission by the Toronto Hamilton and Buffalo Railway Company to any of the men in the employ of the Canadian Pacific Railway Company to walk upon these tracks. If it should be deemed of any importance that these workmen on the occasion in question used a hand-car upon

the tracks of the Toronto Hamilton and Buffalo Railway, or that workmen of the Canadian Pacific Railway Company on other occasions used a hand-car to go to and from their work, I cannot say that there was evidence of any express permission by the Toronto Hamilton and Buffalo Railway Company to the Canadian Pacific Railway Company, or to the employees of the latter company. It would be a fair inference that the use of a hand-car by the Canadian Pacific men upon the tracks of the Toronto Hamilton and Buffalo Railway Company was permitted by that company, but that does not affect the present case.

The jury have found that it was actionable negligence to use a red light instead of a white light at the rear end of a locomotive—front end when running reversely—so as to create liability to a person injured when rightfully upon the track. I neither assent to nor dissent from that finding; but I am of opinion that the accident to the deceased was not occasioned by the absence of a white light.

I put my decision upon the ground that the unfortunate deceased was a trespasser as to the Toronto Hamilton and Buffalo Railway Company, and that there was no duty on the part of that company to the deceased to use a white light, nor any other duty than not wilfully to run him down or put him in danger.

I do not think that there was any evidence to go to the jury as to negligence in the use of red or white lights on the part of the Toronto Hamilton and Buffalo Railway Company.

The accident did not occur by reason of any neglect on the part of the Toronto Hamilton Buffalo Railway Company to fence. There was a notice warning persons who were not employees of the Toronto Hamilton and Buffalo Railway Company to keep off its right of way.

Whether the deceased was a workman of the Canadian Pacific Railway Company and under the direction of a man to whose orders the deceased was bound to conform, or not, makes no difference to the Toronto Hamilton and Buffalo Railway Company. The deceased was not an employee of the Toronto Hamilton and Buffalo Railway Company; and as to this defendant, the action must be dismissed.

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Upon the answers of the jury affecting the defendant the Canadian Pacific Railway Company, I am of opinion that the plaintiff is entitled to judgment against that company.

The deceased was, in my opinion, at the time of the accident a workman in the employ of the Canadian Pacific Railway Company. He was then returning from the work of the day to the place provided by this defendant, to remain over night. He had the tools of his trade and for his work in his possession. It was intended both by the deceased and his employer that he should continue work for this defendant on the following and other days. The sleeping-car was provided by this defendant for the deceased and other workmen similarly employed. Ashby and Bunker were persons in the employ of the Canadian Pacific Railway Company, having charge of the deceased and directing him as to his work and the place where it was to be performed. These were persons to whose orders the deceased was bound to conform. These persons assumed that they had the right to go through the opening in the fence and to go upon the right of way of the defendant the Toronto Hamilton and Buffalo Railway Company and to walk along the tracks.

As between the deceased and the Canadian Pacific Railway Company, the deceased was rightfully upon the track. He was invited to go with those over him and by them to this place of danger. There was no warning to the deceased by his "boss" of any danger.

So far as appears, the deceased did not know that he was upon the tracks of the Toronto Hamilton and Buffalo Railway, or upon any right of way other than that of his employer. There was, in my opinion, negligence on the part of these servants of the Canadian Pacific Railway Company who were over the deceased; and the accident occasioning the death of the deceased was caused by his conforming to the instructions given to him. The "boss" led the way, the deceased followed, and the accident happened by reason of his following instructions.

In order to shew compliance with an order of a master or superior officer, it is not necessary that the order should be of a formal and imperative character. If the employee knows what

evidently is required of him, and even if he suggest something in the way of doing it, he being ignorant of danger, and if the master adopts and directs it, and in the doing of it an injury to the workman is caused, there may be liability by the master. If the employer signifies in any reasonable way what is wanted, and the servant, all in good faith, obeys, that is sufficient. See Labatt on Master and Servant, vol. 4, p. 3915.

There will be judgment for the plaintiff against the Canadian Pacific Railway Company for \$1,000, with costs.

The action against the Toronto Hamilton and Buffalo Railway Company will be dismissed with costs, if such costs are demanded.

The defendant the Canadian Pacific Railway Company appealed from the judgment of BRITTON, J.

February 2 and 3. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

J. D. Spence, for the appellant company, argued that the deceased did not meet with the accident in the course of his employment; that he was not acting under the orders of the company at the time; and that he should not have been on the track at all at that time: *Grand Trunk R.W. Co. v. Anderson* (1898), 28 S.C.R. 541.

F. D. Kerr, for the plaintiff, the respondent, argued that the appellant company failed in its duty to provide a proper way for the linemen boarding in the car, and was liable for the accident thereby occasioned. The deceased was a stranger in Hamilton, and in taking the path along the track was acting under the instructions of the foreman who was with him at the time. He referred to Ruegg's Employers' Liability Act, 7th ed., pp. 103, 111; *Cremins v. Guest Keen & Nettlefolds Limited*, [1908] 1 K.B. 469. *Edwards v. Wingham Agricultural Implement Co.*, [1913] 3 K.B. 596, is distinguishable. No contributory negligence has been found by the jury. The deceased was not *volens*; and the employer owed a duty in such a case to give proper instructions.

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Spence, in reply, pointed out that it was not necessary for the deceased to go on the track in order to get to his car.

March 15. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant the Canadian Pacific Railway Company from the judgment, dated the 2nd November, 1914, which was directed to be entered by Britton, J., on the findings of the jury, at the trial before him at Peterborough on the 14th and 15th September, 1914.

The action is brought under the Fatal Accidents Act, to recover damages for the death of Thomas L. Sharpe, which occurred under circumstances which, according to the contention of the respondent, entitle him to recover damages under the Act.

The deceased was an employee of the appellant, and on the day upon which he met his death had been engaged, under the charge of a foreman named Brinker, in the performance of his duties at Welland. The work there having been completed, the foreman, the deceased, and three of his fellow-employees who had been engaged in the work, returned by train to Hamilton, and arrived there shortly before nine o'clock in the evening. Their destination was a car upon the appellant's line in Hamilton, in which they slept and kept their working tools. When the party reached the Hamilton station, they went to take a car on the street railway by which they would have reached a point near the sleeping-car. Finding that the car they expected to take had already left, they decided to get to the sleeping-car by walking along the railway track. The deceased was a comparative stranger in Hamilton, and it was not shewn, at all events clearly, that he knew that the sleeping-car could be reached by the street car line or that it had been the intention of his companions to have taken passage by the street car.

The deceased was paid for his work by the hour, and his right to be paid his wages came to an end when the work at Welland was completed, or at all events when he had got back to Hamilton.

While proceeding along the railway track, the deceased

was struck by an engine of the Toronto Hamilton and Buffalo Railway Company, which was proceeding in the direction in which he was going, and came up behind him, and he died as the result of the injuries he thus received.

These facts are not in dispute, and it is contended by the appellant that it is not liable because the deceased was a trespasser on the tracks of the railway, to whom neither the appellant nor the other railway company owed any duty except the duty of not knowingly or intentionally injuring him; or that, in the view of the case most favourable to the respondent, the deceased was a mere licensee, and took the risk incidental to the carrying on of the operations of the railway company.

It was argued on behalf of the respondent that the deceased met his death in the course of his employment, and that his injury was caused by reason of the negligence of the foreman, with whose orders or directions the deceased at the time of the injury was bound to conform and did conform, and that the injury resulted from his having so conformed; and that was the view apparently taken by the jury. The jury found, in answer to questions, as follows:—

(3) Were the defendants the Canadian Pacific Railway Company guilty of any negligence which contributed to the death of Thomas L. Sharpe? A. Yes.

(4) If so, what was that negligence? A. Allowing their workmen to walk the tracks to boarding-car.

(5) Was the user of the track and right of way of the defendant the Toronto Hamilton and Buffalo Railway Company by the workmen and repair-men of the Canadian Pacific Railway Company known to and acquiesced in by the Canadian Pacific Railway Company? A. Yes.

(7) Was the deceased, at the time of the accident, in the employ of the Canadian Pacific Railway Company? A. Yes.

(8) Was the deceased, at the time of his death, under the direction and control, as to his work and return to the sleeping-car, of Fred. Brinker? A. Yes, until the tools were placed in car.

(9) Was Fred. Brinker, at the time of the accident, a person

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in the employ of the Canadian Pacific Railway Company to whose orders the deceased was bound to conform? A. Yes.

(10) In starting for the sleeping-car, on the night of the accident, did the deceased Thomas L. Sharpe conform to the orders and direction of Fred. Brinker? A. By his presence he was directed.

There was, in my opinion, no evidence to support these findings. The deceased's injury was not sustained in the course of his employment. When his work at Welland was done, his work for the day had come to an end, and he was no longer subject or bound to conform to the orders or directions of the foreman. Indeed there was no evidence that the foreman gave or assumed to give him any order or direction to proceed along the track to the sleeping-car. The case was simply this: the foreman and the men who had been working with him were proceeding homeward after their day's work was done, and they took what they apparently thought was, in the circumstances, the most convenient way to reach the sleeping-car.

It was argued by Mr. Kerr that it was the duty of the deceased to take to and leave at the sleeping-car the tools he had been using at Welland, and that until he had done that he was still under the direction of the foreman; but, granting that this was his duty, there was no evidence to support the conclusion that until that was done the deceased was still subject to the order or direction of the foreman.

In *Holness v. Mackay & Davis*, [1899] 2 Q.B. 319, the facts were that a firm of contractors, under a contract with a railway company for the widening of its line, were ballasting a siding which was separated from the main line by several lines of rail. The siding could only be reached by walking for a considerable distance through the premises of the railway company, and the workmen were advised by the contractors, with the authority of the railway company, to enter the premises by a gate, from which a path led by the side of the railway to the siding which was being ballasted; it was not necessary, while following this route, to go upon the main line. On a foggy morning, seven minutes before the hour for the commencement of the day's work, a

workman in the employ of the contractors, while on his way to work at the siding, was run over and killed on the main line about 150 yards from the locality of his work; and it was held by the Court of Appeal that it was no part of the contract of employment that the employment should include the time taken in getting to and from the work, that under the circumstances the contractors owed no duty to the workman while proceeding to his work, and that therefore the accident did not arise out of and in the course of the employment of the workman within the meaning of sec. 1, sub-sec. 1, of the Workmen's Compensation Act, 1897.

There were in that case circumstances which made it stronger for the workman than in this case, and it follows from the decision that the result would have been the same if the workman had been returning home after his day's work was done.

Kelly v. Owners of the Ship "Foam Queen" (1910), 3 B.W. C.C. 113, is a decision upon the same line, though in that case the workman met with his injury when he was returning after a week's end holiday to rejoin his vessel.

In *Walters v. Staveley Coal and Iron Co. Limited* (1910-11), 4 B.W.C.C. 89, 303, a miner, proceeding to his work along a footpath prepared by the employers for the workmen's convenience, at a point about a mile away from the place of employment, slipped on some steps known to the employers to be dangerous, and was injured, and it was held that the accident did not happen "in the course of" the man's employment. The observations of Lord Shaw and Lord Robson, pp. 305, 306, are particularly apposite to the facts of this case.

Beckerton v. Canadian Pacific R.W. Co. (1914), 6 O.W.N. 158, may also be referred to.

Having come to the conclusion that the deceased did not meet with his injury in the course of his employment, it is unnecessary for me to consider whether, if an opposite conclusion had been reached, and it had properly been found that the deceased met with his injury while conforming to an order of the foreman to which he was bound to conform, it could properly be found that his injury was the result of the negligent order and

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of the deceased having conformed to it—a finding which would be necessary to entitle the respondent to recover.

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I would allow the appeal, reverse the judgment of the learned trial Judge, and substitute for it a judgment dismissing the action, the whole with costs if costs are asked.

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Appeal allowed.

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MURDOCK v. KILGOUR.

Nov. 2.

Canada Temperance Act—Voting on Petition for Bringing Part II. into Force in County—Jurisdiction of Supreme Court of Ontario to Declare Proceedings Void—Tribunal Provided by Act, R.S.C. 1906, ch. 152, sec. 69—Scrutiny by County Court Judge—Scope of—Governor in Council—Powers of—Sec. 105—Action—Constitution of—Parties—Returning Officer—Injunction.

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The Canada Temperance Act (R.S.C. 1906, ch. 152) provides its own Code of procedure; and the provision which it makes for an inquiry as to whether or not a majority of the votes was or was not given in favour of the petition to the Governor in Council to bring Part II. of the Act into force in a county, affords the only way in which, by a judicial proceeding, the result of the voting can be inquired into.

The judgment of LENNOX, J., in an action in the Supreme Court of Ontario, brought by an elector entitled to vote and who did vote on the submission to the electors of a county of the question of the bringing of Part II. into force, against another elector (supposed to represent persons antagonistic to the bringing into force of Part II.), the returning officer appointed to take the votes, and the Judge of the County Court of the county, declaring that the proceedings for the taking of the vote were not in accordance with the Act and invalid and void, and did not operate to prevent the issue of a new proclamation or the putting of a similar petition to the vote of the electors of the county at any time, and restraining the defendant R., the returning officer, from transmitting any return to the Secretary of State with reference to the proceedings, except a return that the proceedings were invalid and void, was set aside, upon appeal, on the ground that the Court had no jurisdiction. Discussion as to the scope of a scrutiny under sec. 69 of the Act. *Chapman v. Rand* (1885), 11 S.C.R. 312, considered.

Semble, per MEREDITH, C.J.O., that the "tribunal having cognizance of the question" referred to in sec. 105 is the tribunal before which the scrutiny authorised by sec. 69 takes place—that is, in Ontario, the Judge of the County Court.

Semble, per HODGINS, J.A., that, having regard to the various provisions of the Act contained in secs. 11 (*j*), 15, 18, 19, 39, 54, 59, 60, 61, 62, 63, 64, 102, 105, 106, 108, and 110, the tribunal referred to in sec. 105 is the Governor in Council; and also that, if jurisdiction could be assumed, the action was not properly constituted.

THIS action was brought by Andrew Elisha Murdock, an elector entitled to vote under the Canada Temperance Act and

the Election Act of Canada, in the town of Welland, in the county of Welland, and a resident of that town, who voted on the submission of a petition for the taking of the votes of the electors of the county on the question of bringing Part II. of the Canada Temperance Act into force in the county, against F. W. Kilgour, president of the Welland County Hotelkeepers' Association, Hugh A. Rose, returning officer, and L. B. C. Livingstone, Judge of the County Court of the County of Welland, for a declaration that the proceedings taken in and prior to the 29th January, 1914, for a polling of votes, under the last-named Act, were invalid; and to prohibit the defendant Livingstone from determining or certifying as a result of a scrutiny whether the majority was or was not in favour of the petition; and for an injunction restraining the defendant Rose from transmitting his return to the Secretary of State with reference to the proceedings.

The plaintiff moved for a prohibition and injunction in the above terms until the trial of the action.

April 11, 1914. The motion came before LENNOX, J., in the Weekly Court at Toronto, and was turned into a motion for judgment, upon a statement of facts agreed upon, and so heard.

W. E. Raney, K.C., for the plaintiff.

James Haverson, K.C., for the defendants.

November 2, 1914. LENNOX, J.:—The plaintiff does not desire an order prohibiting the County Court Judge.

There are two questions to be determined, namely:—

- (1) Have I jurisdiction?
- (2) Was the vote taken according to law?

The first question is the only one presenting any difficulty. I cannot see that there is much help to be derived from the authorities referred to. I am of opinion that I have jurisdiction.

The other question, I think, is hardly open to argument. Literal compliance with the statute is not essential, but there must be at least substantial compliance. To mention only one point, the ballot used cannot be said to be even the substantial equivalent of the one prescribed by the statute. It is not, of

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course, relevant to argue that it was as good as or better than the statutory form.

There will be a perpetual injunction restraining the returning officer as asked for. I make no order as to costs.

The defendant Kilgour appealed from the judgment of LENNOX, J.

February 3 and 4. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, J.J.A.

James Haverson, K.C., for the appellant, argued that the Court had no jurisdiction to entertain the action: *Bannerman v. Lawyer* (1900), 45 C.L.J. 484; article in 20 C.L.J. 374, "The Canada Temperance Act, 1878," and the case there cited of *The Queen v. Alexander* (1881), 20 C.L.J. 376. Reference was also made to *In re Canada Temperance Act* (1885), 9 O.R. 154; *Ex p. Rand* (1885), 24 N.B.R. 374, reversed on appeal *sub nom. Chapman v. Rand* (1885), 11 S.C.R. 312; *In re Centre Wellington Election* (1879), 44 U.C.R. 132; *McLeod v. Noble* (1897), 28 O.R. 528. The plaintiff has suffered no wrong apart from the public; he has no *locus standi* here; and, if he has, he has not brought the proper parties before the Court as defendants.

W. E. Raney, K.C., for the plaintiff, respondent, referred to *Valin v. Langlois* (1879), 3 S.C.R. 1, 90, 5 App. Cas. 115; *In re Local Option By-law of Saltfleet* (1908), 16 O.L.R. 293; *Re Orangeville Local Option By-law* (1910), 20 O.L.R. 476; *Re West Lorne Scrutiny* (1911), 23 O.L.R. 598; *Stoddart v. Town of Owen Sound* (1912), 27 O.L.R. 221; *McPherson v. Mehring* (1913), 47 S.C.R. 451. As to declaratory judgments, he cited *Woodward v. Sarsons* (1875), L.R. 10 C.P. 733; *Carr v. Town of North Bay* (1913), 28 O.L.R. 623; *Hair v. Town of Meaford* (1914), 31 O.L.R. 124; *Re Vandyke and Village of Grimsby* (1909), 19 O.L.R. 402

March 15. MEREDITH, C.J.O.:—This is an appeal by the defendant Kilgour from the judgment of Lennox, J., dated the 2nd November, 1914, which was directed to be entered on a

motion for judgment upon a statement of facts agreed upon by counsel for the appellant and for the respondent, and embodied in a memorandum filed.

The respondent, who brings the action, is an elector entitled to vote under the Canada Temperance Act and the Election Act of Canada, in the town of Welland, in the county of Welland, and is a resident of that town, and voted on the submission of the petition for the taking of the votes of the electors of the county on the question of the bringing into force in the county of Part II. of the Canada Temperance Act.

The action is brought against the appellant, who is the president of the Welland County Hotelkeepers' Association, Hugh A. Rose, the returning officer, and L. B. Livingstone, Judge of the County Court of the County of Welland; and the claim of the respondent as endorsed on the writ of summons is "for a declaration that the proceedings had and taken in the county of Welland on and prior to the 29th day of January, 1914, for a polling of votes under the Canada Temperance Act, were not pursuant to or in accordance with the proclamation of the Governor in Council in that behalf or to the said Act, and that on or after the 29th day of January, 1914, certain of the ballot boxes used in connection with the said proceedings were tampered with so as to make it impossible to determine what ballots were actually cast by electors and how they were marked, and that the said proceedings did not and do not constitute a polling of votes under the said Act, and were and are invalid and void, and ought not and do not operate to prevent the issue of a new proclamation by the Governor in Council upon the petition upon which the said former proclamation was issued, or the putting of a similar petition to the vote of the electors of the said county at any time; and to prohibit the defendant L. B. C. Livingstone, as Judge of the County Court of the County of Welland, from determining or certifying as a result of the pending scrutiny under the said Act whether the majority of votes given on the said proceedings was or was not in favour of the petition to the Governor in Council; and for an injunction restraining the defendant Hugh A. Rose, as returning officer

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under the said proclamation, from transmitting any return to the Secretary of State with reference to such proceedings except such return as this Honourable Court may be pleased to order.”

The respondent moved for an order prohibiting the Judge until the trial or determination of the action from determining or certifying, as a result of a scrutiny pending before him under the Act, whether the majority of votes given on the proceedings taken in the county of Welland on and prior to the 29th day of January, 1914, pursuant to a proclamation of the Governor in Council for a polling of votes under the Act, was or was not in favour of the petition, or, in the alternative, for an injunction to the like effect, and for an injunction restraining the returning officer until the trial and final determination of the action from transmitting any return to the Secretary of State with reference to the question as to whether or not the majority of the votes was in favour of the petition, or, in the alternative, for an order prohibiting the returning officer from transmitting his return.

On the motion coming on to be heard, it was turned into a motion for judgment, on the facts stated in the memorandum to which I have referred, and judgment was pronounced declaring “that the proceedings had and taken in the county of Welland on and prior to the 29th day of January, 1914, for a polling of votes under the Canada Temperance Act were not pursuant to or in accordance with the proclamation of the Governor in Council for the taking of the votes of the electors of the said county for and against the petition to the Governor in Council for the bringing into force in the said county of Part II. of the said Act, and were not pursuant to or in accordance with the said Act, and that the said proceedings did not and do not constitute a polling of votes under the said Act, and were and are invalid and void, and ought not to and do not operate to prevent the issue of a new proclamation by the Governor in Council upon the petition upon which the former proclamation was issued, or the putting of a similar petition to the vote of the electors of the said county at any time,” and by the judgment it was ordered “that the defendant Hugh A.

Rose be and is hereby perpetually restrained from transmitting any return to the Secretary of State with reference to the said proceedings, except a return that the said proceedings were invalid and void as declared by this judgment;" and it was further ordered that the action be dismissed as against the defendant Livingstone.

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The facts admitted in the memorandum are the following:—

"1. The plaintiff is an elector entitled to vote under the Canada Temperance Act and the Dominion Election Act, in the town of Welland, in the county of Welland, and is a resident of the said town, and voted on the submission of the petition hereinafter referred to.

"2. Pursuant to a petition in that behalf, under the Canada Temperance Act, the Governor in Council issued his proclamation on the 8th day of November, 1913, for the taking of the votes of the electors of the county of Welland on a petition to the Governor in Council for the bringing into force in the said county of Part II. of the Canada Temperance Act, and proceedings in the nature of a poll of the electors of the said county on the said petition took place on the 29th day of January, 1914.

"3. On or about Monday the 2nd day of February, 1914, the defendant Hugh A. Rose, as returning officer, proceeded to open the ballot boxes that had been used in the said proceedings and to sum up the votes, and as a result of such summing up announced that the petition had been defeated by a majority of six votes.

"4. Thereafter on the 17th and 18th and on the 25th, 26th, and 27th days of February, 1914, a scrutiny was had before the defendant L. B. C. Livingstone, Judge of the County Court of the County of Welland, pursuant to provisions of the said Act.

"5. The said scrutiny was had on the application of the plaintiff herein, who is secretary of the committee which had in charge the preparation of the said petition and the submission of the same to the electors. The defendant Kilgour, who is an elector under the said Acts in the said town of Welland,

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was and is president of the Welland County Hotelkeepers' Association, which was and is an organisation opposed to the submission and to the adoption of the said petition in the said county.

"6. All the ballots found in the ballot boxes, the contents of which were examined on the said scrutiny, were in the form marked exhibit A to the affidavit of John Franklin Gross, filed herein.

"7. In a number of the polling places the deputy returning officers did not give out the ballot papers with the counterfoils attached, as required by section 37 of the Canada Temperance Act.

"8. In three of the polling places where proceedings in the nature of a poll were taken on the said 29th day of January, 1914, the deputy returning officers placed numbers on the ballots, instead of upon the counterfoils, the said numbers corresponding with numbers either on the voters' list or in the poll book for the polling subdivisions, in such manner that the said ballots could be identified as ballots that had been marked by individual voters. The number of ballots thus marked was 185.

"9. As a result of the scrutiny aforesaid, the County Court Judge found that 3,616 ballot papers had been marked for the petition, and 3,731 ballot papers against the petition, and is prepared to certify that the petition was defeated by a majority of 115 votes."

The form of the ballot paper mentioned in the 6th paragraph of the memorandum was that prescribed by the Act, except that the following words were omitted:—

"19.

"Voting on the petition to the Governor General for the bringing into force of Part II. of the Canada Temperance Act."

The appellant's contention is, that the Supreme Court of Ontario has no jurisdiction to inquire or determine, by action or otherwise, as to the validity of the voting, or of any other of the proceedings taken under the Act, and also that the re-

spondent had no status to maintain an action, if an action is maintainable, and that the validity of the voting could not properly be determined in an action in which only the appellant, the returning officer, and the Judge of the County Court are defendants.

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It was conceded by counsel for the respondent that he could not support that part of the judgment by which the returning officer is restrained from transmitting his return to the Secretary of State, as required by sec. 64, but he argued that the action, so far as it sought an inquiry into the validity of the voting, was maintainable, and that the action was properly constituted.

No case was cited which supports the contention of the respondent's counsel, and none was referred to, nor have I found one in which the interference of a Provincial Court was sought to obtain such an adjudication as that which was made in this case.

The Canada Temperance Act provides its own code of procedure; and the provision which it makes for an inquiry as to whether or not a majority of the votes was or was not given in favour of the petition to the Governor in Council affords, in my opinion, the only way in which, by a judicial proceeding, the result of the voting can be inquired into.

But for the decision of the Supreme Court of Canada in *Chapman v. Rand*, 11 S.C.R. 312, I should have thought that the powers of the Judge of a County Court in holding a scrutiny under sec. 69 were larger than by that case they were decided to be, but by that decision we are bound unless the subsequent case of *McPherson v. Mehring* (the *West Lorne Case*), 47 S.C.R. 451, has overruled or modified it. Accepting the construction which the Supreme Court in that case put upon the section, I cannot escape from the conclusion that the draftsman of the Act thought, erroneously, as the result has shewn, that he had given to the Judge upon a scrutiny the powers which in that case it was unsuccessfully argued were conferred upon him by what is now sec. 69; and this view is fortified by the pro-

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visions of what is now sec. 105.* No "tribunal having cognizance of the question" is provided for by the Act, unless it be the tribunal before which the scrutiny takes place, which in Quebec is a Judge of the Superior Court, in British Columbia a Judge of the Supreme Court of that Province, or a Judge of the County Court, and in any other Province, except Saskatchewan and Alberta, the Judge of the County Court.

In *Chapman v. Rand*, in the course of the argument of counsel for the respondent, he pointed out that if sec. 62 (now 69) were construed to give the Judge only the power to recount and declare the numerical majority of ballots, sec. 70 (now 105) is meaningless, because, as he argued, there would be no tribunal having cognizance of the question, *i.e.*, of the validity or otherwise of the poll. This argument was not dealt with by any of the Judges except Henry, J., who appears to have agreed with it, for he said (pp. 320-1): "Whether the ballot is right or wrong; whether parties are guilty of corruption or not, are matters into which there is no provision made by the Act to inquire, unless it can be done under the scrutiny." Then, after mentioning the provisions of sec. 62, he went on to say: "Now, what is the meaning of that? Nobody else has any authority to try out the question." And later on he said: "If the judgment of the Court below is wrong, then corrupt or illegal practices will not avoid an election such as this." And there was no dissent from these views expressed by any other member of the Court.

It would be highly inconvenient if the powers of a Provincial Court could at any time be invoked to stay, or to set aside, any of the proceedings leading up to the issue of the proclamation bringing the Act into force, or to set them aside. If that were permissible, those opposed to the bringing of the Act into force might be able to prevent the vote from being

*105. No polling of votes under this Part shall be declared invalid by reason of a non-compliance with the provisions of this Part, as to the taking of the poll or the counting of the votes, or of any mistake in the use of the forms contained in the schedule to this Act, if it appears to the tribunal having cognizance of the question that the polling of the votes was conducted in accordance with the principles laid down in this Part, and that such non-compliance or mistake did not affect the result of the polling.

taken at the appointed time, or to delay the proceedings for bringing it into force until the end of the litigation they had begun, which might not arrive until the case had reached, and had been decided by, the Privy Council.

The provision for the scrutiny and the absence of any other provision for questioning the result or the validity of the voting, point clearly, I think, to the conclusion that Parliament did not intend that any other means should be available for questioning the result of the voting than the scrutiny for which—inadequately as it has turned out—the Act provides.

It may be said that, if this is the correct view, there is no remedy where such irregularities as in this case have been found to have occurred, or perhaps worse ones, have taken place; but, if that be the case, the remedy must be sought in Parliament; and, as I understood the statement of counsel upon the argument, Parliament has already supplied the remedy by an amendment of the Act; and I may add that I do not see why it was not open to the Judge on the scrutiny, if the form of ballot paper used rendered a ballot void—as to which I express no opinion—to have rejected it in making his count, nor do I see why it was not open to him to reject any ballot paper which was numbered as stated in the memorandum, if that was a ground for rejecting it; and, if that be the case, his decision as to the count, even if erroneous, was final (sec. 70).

Having come to the conclusion that my brother Lennox acted without jurisdiction, it is unnecessary to consider the question raised as to the constitution of the action.

I would allow the appeal, reverse the judgment appealed from, and substitute for it a judgment dismissing the action, and leave each party to bear his own costs of the litigation.

GARROW, J.A., concurred.

MACLAREN and MAGEE, JJ.A., agreed in the result.

HODGINS, J.A.:—I agree in the main with the judgment of my Lord the Chief Justice, which I have had the privilege of reading.

The provisions of Parts I. and II. of the Canada Temperance

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Act, R.S.C. 1906, ch. 152, seem to give to the electors qualified to vote for members of the House of Commons the initiative in promoting local prohibition in the county or city to which they belong. In the Governor in Council is vested the right to accede to the request or petition, provided a majority of those electors vote in favour of it. The sections relating to the commencement of these proceedings shew that it is the Governor in Council who must be satisfied that the signatures to the petition are genuine and sufficient; and thereupon the Governor in Council may issue his proclamation, which, in addition to the usual provisions, can include "such further particulars, with respect to the taking and summing up of the votes of the electors, as the Governor in Council sees fit to insert therein" (sec. 11, clause j.)

By sec. 15 the right to vote is defined as belonging to all persons qualified to vote at an election of a member of the House of Commons, and under secs. 18 and 19 the returning officer prepares and furnishes the voters' lists upon which the poll is taken. Provision is also made by sec. 39 for cases where no voters' list exists. By sec. 54, the deputy returning officer's decision upon any objection to a vote is final, subject only to reversal on a scrutiny; and the returning officer is bound to count only such votes as are allowed by the deputy returning officers (sec. 59), except where ballot boxes have disappeared. In that case he is (sec. 61) to ascertain the number of votes "by such evidence as he is able to obtain." He is bound, in making his return, to mention the mode by which he ascertained the number of votes given in each interest (sec. 61). By sec. 65, his return is to be accompanied by the statements of the deputy returning officers, as well as the ballot boxes, etc.

A scrutiny, if applied for, may, in Ontario, be had before the County or District Court Judge, who, "upon inspecting the ballot papers and hearing such evidence as he deems necessary, and on hearing the parties, or such of them as attend, or their counsel, shall, in a summary manner, determine whether the majority of votes was, or was not, in favour of the petition to the Governor in Council;" and his decision is final (secs. 69 and 70).

Many prohibitions and penalties are provided for in the Act. Under sec. 64, the returning officer, in making his return, whether a scrutiny has taken place or not, "shall send with it a report of his proceedings, in which he shall make any observations he thinks proper as to the state of the ballot boxes or ballot papers as received by him." This is in addition to the requirements already pointed out, viz., the mode in which he ascertained the number of votes under sec. 60.

Under these provisions, and having regard to sec. 105 (which corresponds to the well-known curative section in the Ontario Municipal Act), it appears to me that the tribunal which alone has cognizance of the question therein mentioned may well be the Governor in Council, in whom is vested the right or duty, if the petition "has been adopted by the electors," of declaring that Part II. of the Act shall be in force.

The return, if it complies with the statutory requirements, will afford all the information necessary; and there is no reason, if doubt still exists, why the Governor in Council should not call for further information before proclaiming Part II. Section 106 can be read as applying to a criminal prosecution for any offence under the Act, or to a civil action for penalties under sec. 102.

It may be that, but for the view taken by the Supreme Court of Canada, as mentioned by the Chief Justice, sec. 105 might also be held to govern the proceedings on the scrutiny.

The duties of the deputy returning officers, the returning officer, and the County or District Court Judge, respecting the votes polled, while in part judicial, finally result only in forming a foundation for the return which is to be made to the Governor in Council. See secs. 62, 63, and 64. The proclamation, however, depends, not on the return, but on the fact of adoption by the electors, which has to be decided by some tribunal, if the elements mentioned in sec. 105 enter into the question.

If Part II. is finally proclaimed, then the consequences provided in sec. 110 must necessarily follow. In the event of an adverse vote, as in the present case, where there would be, in consequence, no proclamation, sec. 108 enacts that no similar

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petition shall be put to the vote within three years. But there is nothing to prevent such a petition from being prepared, signed, and presented. And, if satisfied that what had taken place was not saved from invalidity by sec. 105, the discretion to act or not to act seems to me to have been left to the Governor in Council. If not, who can say whether the petition is to be acted on or not? This is a situation which arises after a scrutiny by the County Court Judge, and therefore he cannot intervene. It only confronts the executive, who must therefore decide, as it appears to me. It is a small matter to leave to the discretion of the Governor in Council, compared to the judicial duties devolving upon that body under the British North America Act in relation to education, and under the Dominion Railway Act.

I am, therefore, more inclined to the view that the tribunal referred to in sec. 105 is the Governor in Council, owing partly to the narrow limits of the County Court Judge's powers, but particularly because there are larger duties imposed by the Act, and involved in the exercise of the rights it confers, than are comprehended in the scrutiny sections.

If I am right, then I do not know of any power in the Courts of this Province to inquire into the exercise of this discretion, nor to entertain an action against the Governor in Council. The thing is unheard of; and, if it cannot be done directly, it hardly needs to be stated that it cannot be done indirectly.

The Secretary of State, to whom the return is to be made, cannot act upon it: that must be done by the Governor in Council. I had thought during the argument, having regard to such cases as *Shafto v. Bolckow Vaughan & Co.* (1887), 34 Ch. D. 725, *Dyson v. Attorney-General*, [1911] 1 K.B. 410, [1912] 1 Ch. 158, *Burghes v. Attorney-General*, [1911] 2 Ch. 139, [1912] 1 Ch. 173, *Thornhill v. Weeks*, [1913] 1 Ch. 438, [1913] 2 Ch. 464, that proceedings might lie against the Secretary of State for a declaration as to the proper construction of sec. 108. Such an action would determine whether that section referred to the result of the vote as certified, or the result as determined by some judicial decision. But, upon further consideration,

I do not see that those cases can apply to the situation here. In two of them there was either a threat that penalties would be imposed or sued for, and in the others the defendant was said to be interested in making and asserting a right as against the plaintiffs. In the case at bar, the Secretary of State has nothing to do with the penalties, which are either recoverable by a common informer or are imposed in the course of administering the criminal law, which in Canada is enforced by the Provincial authorities. In the English Finance Act cases, the penalties are said to be recoverable in the High Court, and are treated as part of the demand made by the Commissioners or as intended to be enforced by them.

But, whatever view may be taken of the Dominion Temperance Act, it certainly does not warrant the proceedings which have been instituted here. In a matter affecting the electors of the county of Welland, of whom 7,347 voted on one side or the other, the judgment of the Court has been obtained at the instance of one elector against two gentlemen who have not the remotest status either to uphold or to contest the result. Mr. Kilgour happens to be an elector, and is likewise president of the Welland Hotelkeepers' Association, a body commercially interested, and eminently unsuited to represent the 3,731 electors voting against the petition. It is fair to assume that fully nine-tenths of those who voted against the petition must have been free from any pecuniary interest. The other defendant, Rose, is the returning officer, whose duties are defined by statute, and who, occupying that position, has no possible interest in the result and ought not to have been forced into this law-suit.

The result is, that an injunction has been granted against him which would prevent him from performing his statutory duty—a result not supported before us by counsel for the respondent. The County Court Judge was also made a party. What right have any one or all of these defendants to represent the electors of the county of Welland, and how is it possible, if they have no such right, that the Court should make a declaration which, if effective, takes matters out of the hands of the Governor in Council and practically abrogates the provisions of sec. 108 of the Canada Temperance Act?

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I am not aware of any practice that enables a plaintiff to pick out some one individual and litigate with him so as to affect the rights of others not represented by him in law or in fact. The rule of Court under which alone a plaintiff may avoid joining all parties interested is Rule 75, which gives no warrant for this proceeding, and indeed was not even pressed into service.

It is true that in cases under the Liquor License Act of Ontario a practice has obtained of asking the Court to make declarations that the whole poll has been invalid. In *Hair v. Town of Meaford* (1914), 31 O.L.R. 124, I considered myself bound to defer to the opinions expressed, in the cases to which I have referred, by Judges of experience. But I am constrained to say that my own opinion is decidedly against what I regard as a course leading to greater evils than those it is designed to cure. I endeavoured in that case to indicate some of the considerations which led me so to think, and also the principle which ought to govern when declarations are sought against individuals which are intended to govern the public rights of others; and it is unnecessary in this case to enlarge upon them. I mention those cases because they were cited to us as authority for the extraordinary frame of this action.

In *Stoddart v. Town of Owen Sound*, 27 O.L.R. 221, Lennox, J., made a declaration of the kind I have mentioned, but apparently with some hesitation, and he remarks upon the difficulty occasioned by the fact that the council of the municipality, and of necessity its advocate, represented both those for and those opposed to local option. He therefore allowed counsel for one party to aid in the defence. In *Carr v. Town of North Bay*, 28 O.L.R. 623, the learned Chancellor dismissed the action, but on the ground that the allegations of impropriety were not proved. While the town of North Bay was a defendant, the only one who appeared at the trial and argued was referred to by the Chancellor as "a defendant added by special order, B. N. Mulligan." In an earlier case of *Re Vandyke and Village of Grimsby*, 19 O.L.R. 402, Mulock, C.J., reviewed the proceedings at and prior to the voting on a local option by-law and decided that they were invalid, allowing two electors to inter-

vene, as the Council of Grimsby announced that they did not intend to take part in the motion.

In all three cases, which seriously affected the rights of the electors at large on an important public question, the municipality, which alone could claim in any sense to represent them, was either absent or indifferent, and the Court had to rely largely upon assistance volunteered by individuals interested in the result.

The constitution of this case is, if possible, more open to objection, as the action has not the merit of possessing as a defendant any one who even technically represents anybody but himself.

Both for the reasons given in the judgment of my Lord the Chief Justice, and those I have mentioned, I think this appeal should be allowed and the action dismissed. But, as both parties have participated in a proceeding which, in my opinion, has no real foundation and should not have been pursued, they may well be directed to bear their own costs throughout.

Appeal allowed.

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Statutes—Factory Shop and Office Building Act, 3 & 4 Geo. V. ch. 60—Contravention—Absence of Fire-escapes and Presence of Inflammable Material—Lives Lost in Burning Building—Failure to Connect Deaths with Contravention—Evidence.

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Proof of the contravention of the Factory Shop and Office Building Act, 3 & 4 Geo. V. ch. 60 (now R.S.O. 1914, ch. 229)—as in this case by shewing that the defendant's building, in which the husbands of the plaintiffs were employed, was not provided with fire-escapes (sec. 59) and that combustible or inflammable material was kept therein (sec. 56)—and that a person lost his life in the building when it was burnt, is not enough to entitle his personal representatives or dependents to recover damages for his death; but there must be, in addition, reasonable evidence to warrant the conclusion that the death resulted from the contravention; and in this case the plaintiffs failed because of the absence of that evidence.

The absence from the Act of any such provision as sec. 17 of the Imperial Merchant Shipping Act, 1873, pointed out, and Admiralty cases such as *The Fanny M. Carvill* (1875), 13 App. Cas. 455 (note), distinguished. Judgment of FALCONERIDGE, C.J.K.B., affirmed.

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Hodgins, J.A.

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ACTIONS by the widows of two men who were employed by the defendant in the Chatham "Planet" building, owned by him, which was destroyed by fire on the 9th May, 1913, to recover damages for their deaths respectively, they having lost their lives in the fire. The plaintiffs alleged negligence and neglect of statutory duty on the part of the defendant.

February 28, 1914. The actions were tried by FALCONBRIDGE, C.J.K.B., without a jury, at Chatham.

I. F. Hellmuth, K.C., and *J. G. Kerr*, for the plaintiffs.

O. L. Lewis, K.C., and *W. G. Richards*, for the defendant.

March 27, 1914. FALCONBRIDGE, C.J.K.B.:—I am of the opinion that the causal connection between the alleged negligence or breach of duty of the defendant and the death of the plaintiffs' husbands has not been established. The alleged want of fire-escape appliances, and non-compliance with the provisions of the Factory Shop and Office Building Act, are not proved to have been the proximate cause of their deaths. Exactly how the unfortunate men were killed is purely a matter of conjecture.

There was more than one easy, safe, and sufficient means of egress from the first floor, i.e., the second storey (in which the plaintiffs' late husbands were at the time of their death) to the ground.

Richard Pritchard, the city fire chief, testified that he inspected the buildings before the fire. He asked for no further exits, etc.—there was no necessity whatever for them, he said. The defendant complied with every suggestion which he, Pritchard, made.

The actions must be dismissed with costs, if exacted. There will be a stay of proceedings for thirty days.

As to the law, I have consulted the following, amongst other, authorities. The statute is 3 & 4 Geo. V. ch. 60 (now R.S.O. 1914, ch. 229); *Hagle v. Laplante* (1910), 20 O.L.R. 339; *Grand Trunk R.W. Co. v. Griffith* (1911), 45 S.C.R. 380; *The Schwan, The Albano*, [1892] P. 419; *Carnahan v. Robert Simpson Co.* (1900), 32 O.R. 328; Ruegg on Employers' Liability, Can. ed.,

pp. 6, 12, 242 to 247, and 34, 39, 206, 239; *Thompson v. Ontario Sewer Pipe Co.* (1908), 40 S.C.R. 396; *Canadian Coloured Cotton Mills Co. v. Kervin* (1899), 29 S.C.R. 478; *Pomfret v. Lancashire and Yorkshire R.W. Co.*, [1903] 2 K.B. 718; *Ross v. Cross* (1890), 17 A.R. 29; *Wadsworth v. Canadian Railway Accident Insurance Co.* (1912), 26 O.L.R. 55, reversed (1913) 28 O.L.R. 537; *Winspear v. Accident Insurance Co.* (1880), 6 Q.B.D. 42; *Lawrence v. Accidental Insurance Co.* (1881), 7 Q.B.D. 216; *Hensey v. White*, [1900] 1 Q.B. 481; *Pressick v. Cordova Mines Limited* (1913), 4 O.W.N. 1334, 5 O.W.N. 263; *Ramsay v. Toronto R.W. Co.* (1913), 5 O.W.N. 20, 556; *Montreal Rolling Mills Co. v. Corcoran* (1896), 26 S.C.R. 595; *Young v. Owen Sound Dredge Co.* (1900), 27 A.R. 649; *Gorris v. Scott* (1874), L.R. 9 Ex. 125; *Goodwin v. Michigan Central R.R. Co.* (1913), 29 O.L.R. 422; *Ronson v. Canadian Pacific R.W. Co.* (1909), 18 O.L.R. 337; *Johnston v. Great Western R.W. Co.*, [1904] 2 K.B. 250; *Stephens v. Toronto R.W. Co.* (1905), 11 O.L.R. 19; *Loffmark v. Adams* (1912), 7 D.L.R. 696 (B.C.); *Jones v. Morton Co.* (1907), 14 O.L.R. 402; *The Pennsylvania* (1873), 19 Wall. (S.C.U.S.) 125; *The Chilian* (1881), 4 Asp. M.C.N.S. 473; *Stone v. Canadian Pacific R.W. Co.* (1912), 26 O.L.R. 121, reversed (1913) 47 S.C.R. 634.

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The plaintiffs appealed from the judgments of FALCONBRIDGE, C.J.K.B., in the two actions.

January 18, 1915. The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

I. F. Hellmuth, K.C., and *J. G. Kerr*, for the appellants, argued that when they proved the absence of the fire-escapes required by statute, the onus was cast upon the defendant of shewing that the deaths were not due to such absence: *The Duke of Buccleuch*, [1891] A.C. 310; *Stone v. Canadian Pacific R.W. Co.*, 47 S.C.R. 634; *The Arklow* (1883), 9 App. Cas. 136; *The Corinthian*, [1909] P. 260; *Dunlop v. Canada Foundry Co.* (1912), 28 O.L.R. 140; *The Bellanoch*, [1907] A.C. 269; *Grand Trunk R.W. Co. v. McAlpine*, [1913] A.C. 838; *Lefebvre v. Trethewey Silver Cobalt Mine Limited* (1912), 3 O.W.N. 1535; *Cottingham v. Longman* (1913), 48 S.C.R. 542; *Beven on Negli-*

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gence, 3rd ed., p. 1091; *Pere Marquette R.W. Co. v. Crouch* (1909), 13 Can. Ry. Cas. 247, at p. 261. There is no doubt about the breach of the provisions of sec. 56 of the Factory Shop and Office Building Act.

O. L. Lewis, K.C., and *Christopher C. Robinson*, for the defendant, respondent, contended that the action had been properly dismissed, because the causal connection between the alleged negligence of the defendant and the death of the plaintiffs' husbands had not been proved. Neither the want of the fire-escapes nor the presence on the premises of the printer's ink had been shewn to be the proximate cause of their deaths: *Carnahan v. Robert Simpson Co.*, 32 O.R. 328; *Hagle v. Laplante*, 20 O.L.R. 339; *Pomfret v. Lancashire and Yorkshire R.W. Co.*, [1903] 2 K.B. 718; *Ross v. Cross*, 17 A.R. 29; *Young v. Owen Sound Dredge Co.*, 27 A.R. 649; *Montreal Rolling Mills Co. v. Corcoran*, 26 S.C.R. 595; *Loffmark v. Adams*, 7 D.L.R. 696; *Gorris v. Scott*, L.R. 9 Ex. 125. The cases decided under the Merchant Shipping Acts, 1854 to 1873, cited for the appellants, do not apply because there is no provision in our Factory Shop and Office Building Act such as contained in sec. 17 of the Imperial Merchant Shipping Act of 1873 (36 & 37 Vict. ch. 85), regarding the burden of proof.

Hellmuth, in reply.

March 15. The judgment of the Court was delivered by MEREDITH, C.J.O.:—These are appeals by the respective plaintiffs from the judgments dated the 27th March, 1914, which were directed to be entered by the Chief Justice of the King's Bench, after the trial of the actions before him, sitting without a jury, at Chatham, on the 28th February, 1914.

The actions are brought under the Fatal Accidents Act, to recover damages for the deaths of Alexander McDougall and Robert J. Birch, which were caused, as the appellants allege, owing to the failure of the respondent to comply with the provisions of the Factory Shop and Office Building Act, 3 & 4 Geo. V. ch. 60, as to fire-escapes (sec. 59) and as to the keeping of combustible or inflammable material (sec. 56).

That the respondent was guilty of a contravention of sec. 59

is undoubted, and the fact that there were other means of escape is immaterial, except upon the question whether the deaths of the two men were caused by the absence of the fire-escapes which, by the section, the respondent was required to have provided.

There is more difficulty as to the barrel, partly filled with printer's ink, which was undoubtedly both combustible and inflammable; but I am inclined to think that there was also a contravention of sec. 56, in not keeping the ink, when not in actual use, in a building separate from other parts of the factory, or in a fireproof compartment in the factory.

Although this part of the appellants' cases was proved, I have reluctantly come to the conclusion that the actions fail and were rightly dismissed, because there was no evidence which warranted the conclusion that the deceased came to their deaths because of the failure of the respondent to provide the prescribed fire-escapes, or of the presence of the printer's ink in the respondent's factory. I say reluctantly because, if in such a case as this there can be no recovery, the purpose of the Legislature in enacting the section in question will be frustrated in many, and perhaps in most, cases where death occurs, owing to the great difficulty that will exist in establishing the causal connection between the death and the absence of the fire-escapes or the presence of the combustible or inflammable material.

Upon the evidence it is impossible to say that the deaths of the deceased were occasioned by the absence of the fire-escapes or the presence in the factory of the printer's ink, or both. It is consistent with the evidence, and perhaps the most probable theory, that they were suffocated by the smoke of the burning building, especially as the avenues of escape, by the windows which opened from the composing room, in which they were working when the fire began on the "lean to," and by the stairways, were not made use of as a way of escape, and as the loud calls which were made to them before the fire had made much progress, and before it had reached the composing room, met with no response. The place in which the bodies were found on the day following the fire also supports this theory; and, besides this, there is an entire absence of anything to indicate that the deceased had sought escape by any window at which a fire-escape ought to have been found.

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It is clear, I think, that proof of a contravention of the Act and that a person lost his life in the burning building, is not enough to entitle his personal representatives or his dependents to recover; but there must be, in addition to this, reasonable evidence to warrant the conclusion that the death resulted from the contravention, and the appellants fail because of the absence of that evidence.

The Admiralty cases cited by Mr. Hellmuth have no application. The doctrine laid down in them, that an infringement of the regulations for preventing collisions contained in or made under the Merchant Shipping Acts, 1854 to 1873, must be one having some possible connection with the collision, or, in other words, the presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision, and that the burden of shewing this lies on the party guilty of the infringement, proof that the infringement did not in fact contribute to the collision being excluded, depends upon the provisions of sec. 17 of the Merchant Shipping Act, 1873, which are as follows: "If, in any case of collision, it is proved to the Court before which the case is tried, that any of the regulations for preventing collision contained in, or made under, the Merchant Shipping Acts, 1854 to 1873, have been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulations necessary."

In the case of *The Fanny M. Carvill* (1875), 13 App. Cas. 455 (note), it was held by the Privy Council that the presumption which this section creates may be met by proof that the infringement could not by any possibility have contributed to the collision. This view as to the true construction of the section was treated as settled law by the Privy Council in the case of *The Arklow*, 9 App. Cas. 136, and was approved and adopted by the House of Lords in the case of *The Duke of Buccleuch*, [1891] A.C. 310, and was applied by the Court of Appeal in the case of *The Corinthian*, [1909] P. 260. In this last case it was argued that the rule had been modified or explained by the House of Lords in the case of *The Bellanoch*, [1907] A.C. 269;

and that, according to the decision in that case, the statutory presumption may be rebutted by shewing that the infringement of the regulation did not in fact affect the collision; but that contention was rejected by the Court.

There being in the Factory Shop and Office Building Act no provision similar to that of sec. 17 of the Merchant Shipping Act, 1873, these cases, as I have said, have no application; but, though they cannot help the appellants, they may suggest to the Legislature the advisability of amending the Provincial Act by providing that there shall be such a presumption as sec. 17 raises, where there has been a non-observance of those provisions of the Act which are designed to safeguard human life.

It is unnecessary to discuss the cases bearing upon the general question as to what is sufficient evidence of the causal connection between a wrongful act or omission and the injury which is alleged to have resulted from it, but I may refer to *Smith v. Midland R.W. Co.* (1888), 57 L.T.R. 813, as a case which illustrates the difficulty which a plaintiff has to meet where a condition which is proved to exist might have been due to several causes and there is nothing to indicate by which of them it was caused.

I would dismiss the appeals with costs, if costs are asked.

Appeals dismissed.

[MIDDLETON, J.]

TREASURER OF ONTARIO V. CANADA LIFE ASSURANCE CO.

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*Constitutional Law—Corporations Tax Act, R.S.O. 1914, ch. 27, sec. 4(3)
—Taxation of Insurance Companies—Premiums Received by Companies
—Powers of Provincial Legislature—“Direct Taxation within the Province”—British North America Act, 1867, sec. 92(2).*

March 16.

The Corporations Tax Act, R.S.O. 1914, ch. 27, as amended by 4 Geo. V. ch. 11, in so far as it imposes a tax upon the gross premiums received by any insurance company in respect of business transacted in Ontario, including every premium which by the terms of the contract is payable in Ontario, or which is in fact paid in Ontario, or is payable in respect to a risk undertaken in Ontario, or in respect of a person or property resident or situate in Ontario at the time of payment (clauses (a) and (c) of sec. 4(3), as enacted by 4 Geo. V. ch. 11, sec. 2), is within the powers of the Ontario Legislature: the tax imposed comes within the words of sub-sec. 2 of sec. 92 of the British North America Act, 1867, “Direct Taxation within the Province.”

Bank of Toronto v. Lambe (1887), 12 App. Cas. 575, explained and applied.

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ACTION to recover \$25,059.25, the amount of taxes assessed against the defendant company under the authority of the Corporations Tax Act, R.S.O. 1914, ch. 27.

March 5. The action was tried by MIDDLETON, J., without a jury, at Toronto.

W. S. Brewster, K.C., for the plaintiff.

Edward Bayly, K.C., for the Attorney-General for Ontario.

A. W. Anglin, K.C., for the defendant company.

March 16. MIDDLETON, J.:—Action to recover the sum of \$25,059.25, the amount of taxes assessed against the defendant under the authority of the Corporations Tax Act, R.S.O. 1914, ch. 27. The defence is, that the statute imposing this tax is in whole or in part *ultra vires* the Provincial Legislature, because the tax imposed is not within sub-sec. 2 of sec. 92 of the British North America Act, "Direct Taxation within the Province."

This taxation originated in an Act 62 Vict. (2) ch. 8, passed in 1899, and from time to time amended until it assumed its present form in the Revised Statutes of 1914. The Revised Statute has been further amended by the Act 4 Geo. V. ch. 11, which increases the rate of taxation imposed upon insurance companies from one per cent. to one and three-quarters per cent., calculated on the gross premiums received by the company in respect of business transacted in Ontario.

The tax so imposed has been paid by the different insurance companies until last year, when the increased rate became operative.

This action is a test case, for the purpose of determining the validity of the legislation in question.

That the Province may tax the insurance companies is not denied. The complaint is, that the tax is not a direct tax, and that, by virtue of an interpretation clause, the taxation is made to extend to subject-matter which is not "within the Province."

The case really turns upon the correct understanding of the decision of the Privy Council in *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575. There the Province of Quebec imposed a tax upon banks and insurance companies. The tax upon

the banks varied with the paid-up capital, and an additional tax was imposed for each office or place of business. The tax upon insurance companies was of a named sum, without reference to the amount of its capital.

Their Lordships accepted as the definition of direct and indirect taxation that found in the writings of John Stuart Mill: "Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs. The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price:" Pol. Ec., bk. V., ch. iii., sec. i.

While accepting this definition, their Lordships make it abundantly plain that they do not intend to import into the construction of this legislative enactment all the refinements adopted by political economists or by Mill himself in his discussion of this question: "It must not be forgotten that the question is a legal one, viz., what the words mean, as used in this statute; whereas the economists are always seeking to trace the effects of taxation throughout the community, and are apt to use the words 'direct,' and 'indirect,' according as they find that the burden of a tax abides more or less with the person who first pays it" (p. 581).

Reference is then made to the opinion of Mr. Fawcett, "that a tax may be made direct or indirect by the position of the taxpayers or by private bargains about its payment." Concerning this it is said: "Doubtless such remarks have their value in economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax that it affects persons other than the first payers; and the excellence of the economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The Legis-

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lature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies."

The definition from Mill is adopted, not "with the intention that it should be considered a binding legal definition, but because it seems . . . to embody with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present to the minds of those who passed the Federation Act" (p. 583).

Precisely similar statements are made in other cases which have been carried to the Court of last resort; and in the latest of these, *Cotton v. The King*, [1914] A.C. 176, it is said (p. 193): "Their Lordships are of opinion that these decisions have established that the meaning to be attributed to the phrase 'direct taxation' in sec. 92 of the British North America Act, 1867, is substantially the definition quoted . . . from the treatise of John Stuart Mill, and that this question is no longer open to discussion."

Mr. Anglin drew attention to the fact that the phrase "indirect taxation" is not found in the Act, and argued that there might be taxation which could not be regarded as either direct or indirect, and that the Province had no jurisdiction, unless it could be ascertained that the tax imposed was in truth a direct tax. This argument appears to have been put forward by counsel in the *Lambe* case; and I think it must be taken to have been repudiated by their Lordships, and that it may now safely be said that all taxation is, for the purpose of this Act, to be regarded as either direct or indirect. It is either demanded from the very person who is intended or desired should pay it, or it is demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.

Bearing in mind that it has been held that a company possesses a distinct individuality from its shareholders, it might be argued from a theoretical stand-point that every tax imposed upon a joint stock company is indirect, because the taxation is in

truth borne by the shareholders. But in the construction of this statute no such narrow interpretation can be given effect to, and the decision in *Bank of Toronto v. Lambe* is conclusive authority; for there the tax imposed upon incorporated companies was upheld.

What Mr. Anglin argued with reference to the tax now in question was that the intention, as ascertained from the Act itself, applied to the existing state of affairs, is that the tax, though imposed upon the insurance company, is in truth indirect because the Legislature must have contemplated that it would not in the result be borne by the insurance companies, but would be cast upon the policy-holders. The imposition of a tax of one and three-quarters per cent. upon the premiums collected must in the long run mean that larger premiums must be paid to precisely that extent, or the companies cannot continue to transact business. The insurance companies are in truth, he says, dealers in insurance as a commodity, and this tax on the cost of the commodity, though levied on the vendor, must inevitably be paid by the purchaser.

At first sight this argument appears to be cogent and forcible; but, after the best consideration I can give to the matter, it appears to me to be unsound. The great bulk of insurance effected within the Province is effected upon the participating plan. The premiums levied are, to use technical language, "loaded;" that is, they are greater than necessary to meet the actual expected loss. This excess or "loading" constitutes the so-called "profit" in the operation of the company, and it is divided between the shareholders and the participating policy-holders. Under the general law, the shareholders can only receive ten per cent. of the profit. Ninety per cent. must be divided among the participating policy-holders. See the Dominion Insurance Act, 1910, 9 & 10 Edw. VII. ch. 32, sec. 110.

The effect of the payment of any taxation out of the gross income of the company will be to reduce the amount of profits available for distribution among the shareholders and the participating policy-holders. The tax does not become indirect because the amount which would reach the shareholders is reduced, nor does it become indirect because the amount

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which would reach the participating policy-holders would also be reduced. In other words, this case comes precisely within the words already quoted. An economist might argue that this tax had been made indirect by the position of the policy-holders and by the bargain or contract between the insurance company and the policy-holders; but no such distinction can be imported into the interpretation of this statute. The policy-holders having contracts with the company stand in precisely the same position, as far as this matter is concerned, as do its shareholders. They alike share in its profits under their several contracts, but this does not affect the true nature of that tax.

To illustrate by analogy. A tax upon land or a tax upon its rental value is undoubtedly a direct tax. It does not become an indirect tax because the land has been leased, and under the lease the tenant has undertaken to pay all taxes. A tax upon the business of an employer is a direct tax, and does not become an indirect tax because he has made an agreement to permit his employees to share in the net profits.

It is true that this taxation may indirectly cause insurance companies to raise the premium upon insurance, either in the case of participating or in the case of non-participating policies, or perhaps both. It is by no means clear that this will be so, for the profits divided greatly exceed the amount of taxation; but, even if so, in the great majority of instances taxation which no one doubts is direct does enhance the price of commodities, and so the burden is, in some more or less circuitous way, passed on to the ultimate consumer. A business tax or a tax upon business turn-over or a tax upon business premises is undoubtedly regarded by the merchant or manufacturer as a part of the overhead charges which must be considered in fixing the price of the goods manufactured or sold. In this way it is in one sense passed on to the consumer; but the dominant intention of the Legislature is to impose a direct tax on the merchant, leaving him to recoup himself if he can devise the means, and as best he can. Therefore, the tax is direct.

All this, however, is beside the question, if I am correct in the

view which I entertain that the taxation is direct, even though, by the contract of the policy-holders, ninety per cent. of it must be borne by them.

An argument was presented by Mr. Brewster which is not without weight: that the great bulk of this taxation, certainly the entire taxation for the year 1914, must in truth be borne by the company, for the premiums are payable on pre-existing contracts which are not susceptible of change. While this is undoubtedly so, I prefer to rest my judgment upon the broader ground indicated, as the taxation is not of a temporary nature, and the incidents peculiar to a transition period are not a fair index of the real nature of the tax imposed.

Much has been said concerning the clause in question, looking only at the words "direct taxation" torn apart from their context and without regard to their historical setting.

The framers of the Act sought to mould a stable Dominion out of separate Provinces and to end the jealousy and friction which had resulted from the antagonisms and conflicting interests incident to their separate existence. "Trade and Commerce" was assigned to the Dominion, and with it had to go the power of imposing customs and excise duties. Manifestly no Province could be permitted to interfere with the general fiscal policy of the Dominion by any such indirect tax; but the Provinces had to be given some source of income; and so direct taxation, and this alone, was permitted.

These considerations seem to indicate that it was not so much the intention to limit the Provincial powers to taxation which would be direct in the strictest sense in which that term is used by political writers, as to prevent the imposition of indirect taxes which would tend to interfere with the general policy of the Confederation. The ultimate incidence of the tax was not so much the concern of the draftsman as the securing of freedom for the Dominion from any interference by the Provinces in matters assigned to it. The term "direct taxation" ought therefore to be liberally and not narrowly construed, and all taxation which can fairly be regarded as direct should be permitted so long as it is confined "within the Province."

The tax which is imposed under the Corporations Tax Act is

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said (in clause (a) of sec. 4 (3), as enacted by 4 Geo. V. ch. 11, sec. 2) to be upon the gross premiums received by the company in respect of the business transacted in Ontario; but, by clause (e), this is made to cover every premium which by the terms of the contract is payable in Ontario, or which is in fact paid in Ontario, or is payable in respect to a risk undertaken in Ontario, or in respect of a person or property resident or situate in Ontario at the time of payment. Notwithstanding the wide scope of this interpretation, I think the tax still remains a direct tax within the Province. The application of any artificial scale to determine the amount to be paid where the company taxed is in the Province or has assets which can be reached within the Province, does not appear to me to change the nature of the tax or to take it outside the powers of the Legislature.

The problem which the Legislature was called upon to face, when devising a fair basis for the taxation of insurance companies, was not easy. The amount of capital employed within the Province could not be ascertained. The amount of capital bears no relation to the amount of business done; a fixed assessment or tax would bear heavily upon the smaller companies. The amount of premiums received for business within the Province seemed to be a fair criterion. The Courts, however, are not concerned with the reasonableness of the tax. I can find nothing *ultra vires* in the mode of assessment provided.

In dealing thus with this case I have perhaps done scant justice to the very careful and elaborate arguments presented by counsel; but nothing can be gained, so far as I can see, by more elaborate discussion at this stage.

Judgment will be for the plaintiff for the recovery of the amount claimed.

[CLUTE, J.]

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*Bill of Exchange—Acceptance for Accommodation and upon Condition—
Delivery to Bankers of Drawer—Knowledge of Bankers—Oral Evidence
—Admissibility—Holder in Due Course.*

A bill of exchange, drawn by a manufacturing company upon and accepted by the defendants, was delivered by the company to its bankers, the plaintiffs, and placed to its credit upon an overdrawn account. In an action to recover the amount of the bill, it was *held*, upon the evidence, that the defendants accepted the bill for the accommodation of the company and upon the distinct understanding and agreement, to which the plaintiffs were parties, that the defendants would not be called upon to pay it unless they were, at its maturity, indebted to the company; that oral evidence to establish the condition or agreement upon which the bill was accepted was admissible, not to vary the written document, but to shew that the operation of it was suspended until an indebtedness at the end of the term mentioned in it should be ascertained.

Consideration of the provisions of the Bills of Exchange Act, secs. 38, 39, 54, 55, 56, 74, and review of the authorities.

Held, therefore, that the plaintiffs were in no better position than the company, and were not holders in due course. If there was no indebtedness of the defendants to the company, the action should be dismissed. If there was an indebtedness, there should be judgment for the plaintiffs for the amount of the bill, if so much were due, or for such lesser sum as might be found due.

ACTION upon a bill of exchange accepted by the defendants.

March 9. The action was tried by CLUTE, J., without a jury, at Stratford.

R. S. Robertson, for the plaintiffs.

George Wilkie, for the defendants.

March 19. CLUTE, J.:—The action is brought upon a bill of exchange for \$2,500, made by the New Hamburg Manufacturing Company, and drawn upon and accepted by the defendants. The bill was delivered by the New Hamburg Manufacturing Company to the plaintiffs and placed to the company's credit upon an overdrawn account; reducing the same by the amount of the draft, less the discount. The plaintiffs rested their case by putting in the bill of exchange; the signature of the defendants was admitted.

The defendants contend that they are not liable because the draft was accepted by them as accommodation to the New Hamburg Manufacturing Company, and transferred to the plaintiffs

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without consideration, and was accepted upon the condition that the defendants should not be liable for and would not pay the bill at maturity unless at that date it was found that the defendants were indebted to the New Hamburg Manufacturing Company for the amount of the bill. The plaintiffs deny that the bill was transferred to them upon the terms alleged, and claim that they are holders in due course for value. They further allege that oral evidence tending to prove the allegations of the defendants is inadmissible, inasmuch as it varies the written instrument.

The facts I find to be as follows. The plaintiffs have a branch at New Hamburg, which carried the account of the New Hamburg Manufacturing Company, and at the time the draft was given the account was overdrawn to the extent of over \$17,000, and the bank stood to lose a large amount on the account; the company is now in liquidation.

The New Hamburg Manufacturing Company manufactures machinery of different kinds in the village of New Hamburg. For some time prior to the date of the draft, there had been dealings between the defendants and the New Hamburg Manufacturing Company—transactions between them by way of purchase by the defendants and as agents for sale—and the defendants allege that, at the time the draft was given, they were not indebted to the New Hamburg Manufacturing Company for any sum whatever, but, on the contrary, the New Hamburg Manufacturing Company was indebted to the defendants in the sum of over \$500.

The plaintiffs were pressing the New Hamburg Manufacturing Company for further security, and that company represented to the bank (plaintiffs), which was the fact, that the company had in course of manufacture two machines for the defendants, from whom they expected to receive over \$5,000, on the delivery and acceptance of this machinery. The bank urged the company to get a bill accepted by the defendants, and for that purpose Paul Jocker, in the employ of the company, was sent to Toronto. I find that the defendants refused to accept the bill, claiming that the New Hamburg Manufacturing Company was indebted to them; and, after two days, Jocker returned with the

bill unaccepted. Thereupon a further interview took place between the bank manager at New Hamburg, Mr. Fox, and some officials of the New Hamburg Manufacturing Company. The bank manager stated that he would undertake that, if the defendants would accept the bill, they should not be called upon for payment unless at its maturity the defendants were indebted to the New Hamburg Manufacturing Company for that amount. Jocker again went to Toronto with this statement, with a view to obtaining the acceptance of the bill. The defendants still refused to accept without calling up the bank agent and ascertaining that he understood the arrangement to be as alleged. This was done; and I find as a fact that the bank manager acquiesced in this arrangement; that is, that if the defendants would accept the bill they would not be called upon for payment unless they were indebted to the New Hamburg Manufacturing Company at its maturity. The evidence as to the fact of such an arrangement being made and acquiesced in by the bank is, I think, beyond all reasonable doubt. The bank manager does not remember it, but it is quite clear that he is not able to deny it; and, while I impute no intention whatever on the part of the bank manager to misstate the facts, I think he has forgotten them.

I find, therefore, the issue upon this question of fact in favour of the defendants. The further question remains, whether the evidence as to the conditional acceptance is admissible.

The Bills of Exchange Act, R.S.C. 1906, ch. 119, sec. 55(1), describes an accommodation party to a bill as a person who has signed as drawer, acceptor or endorser, without receiving value therefor, and for the purpose of lending his name for some other person; (2) he is liable on the bill to a holder for value, and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not. Where value has been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who become parties prior to such time; and where the holder of a bill has a lien on it, he is deemed to be a holder for value to the extent of the sum for which he has a lien: sec. 54. A holder in due course is one who has taken a bill, complete and regular on the

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face of it, under the following conditions: (a) that he became the holder of it before it was overdue and without notice of dishonour, if such was the fact; (b) that he took the bill in good faith and for value, and at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it; (2) the title of a person who negotiates a bill is defective if obtained by fraud, etc., or when he negotiates it in breach of faith, or under such circumstances as amount to fraud: sec. 56. A "holder in due course" is, in effect, a "*bonâ fide* holder for value without notice." The rights and powers of the holder of a bill are defined by sec. 74: (c) where his title is defective, if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill. The contract on a bill is incomplete and revocable until delivery of the instrument in order to give effect thereto: sec. 39. A qualified acceptance in express terms varies the effect of the bill as drawn, and an acceptance is qualified which is (a) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated: sec. 38, sub-sec. 3. The qualified acceptance contemplated by the Act is, of course, one in express terms forming part of the acceptance. The view has been expressed that there may be other cases of qualified acceptance: Byles on Bills, 17th ed., p. 210; *Decroix Verley et Cie. v. Meyer & Co. Limited* (1890), 25 Q.B.D. 343, 347, 348.

Sections 40 and 41 of the Act deal with the question of delivery. By sec. 40, in order to be effectual a delivery (a) must be made by or under the authority of the party drawing, accepting, or endorsing, as the case may be, and may be shewn (b) to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill. By sub-sec. 2, if the bill is in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him, is conclusively presumed. By sec. 41, where a bill has passed out of the possession of the drawer, acceptor, or endorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

The law seems to be well settled that the delivery of a bill may be conditional, and that effect will be given to the condition. The question usually is, in such cases whether the person seeking

to recover on the bill is a *bonâ fide* holder for value without notice, that is, a holder in due course. See Chalmers on Bills of Exchange, 7th ed., p. 61; *Watson v. Russell* (1862), 3 B. & S. 34, affirmed (1864) 5 B. & S. 968; *Clutton v. Attenborough & Son*, [1897] A.C. 90. B. makes a note payable to C., who sues him on it. B. can defend himself by shewing that the note was delivered to C. on condition that it was only to operate if he could procure B. to be restored to a certain office, and that B. was not so restored: *Jefferies v. Austin* (1726), 1 Stra. 674. C., the holder of a bill, endorses it in blank and hands it to D. on the express condition that he shall forthwith retire certain other bills therewith. He does not do so. D. cannot sue C., and, if he sue the acceptor, the latter may set up a *jus tertii*.

In *Bell v. Lord Ingestre* (1848), 12 Q.B. 317, A. sent his acceptances to the holder of some overdue bills for the express purpose of retiring such bills, and on the express condition that the bills should be returned to him by the next post, which condition was never complied with. It was held that no interest in the acceptances passed. Lord Denman, C.J., said: "It is a singular sort of escrow; for the bills were delivered to the parties who, in the event of their performing a certain act, were to be benefited by them. But still I think they were delivered to them as mere trustees, and that the same principle applies." Coleridge, J., said: "Until the condition was performed, no interest was to pass to the transferees." In *Seligmann v. Huth* (1877), 37 L.T.R. 488, the defendants held two bills upon the condition precedent that they would accept the plaintiffs' drafts upon themselves; and, the condition having been broken, the plaintiffs were held entitled to recover the proceeds of the two bills which the defendants had wrongfully converted to their own use. In both of these cases the condition appeared in writing by letters accompanying the bills.

Evidence is admissible to shew that a note was given as collateral security for a running account, and what the state of that account is: *Ex p. Twogood* (1812), 19 Ves. 229; *In re Boys* (1870), L.R. 10 Eq. 467.

The result of the cases as to when and to what extent oral evidence may be given is, I think, correctly stated in Chalmers.

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Oral evidence is inadmissible in any way to contradict or vary the effect of a bill or note; but it is admissible (a) to shew that what purports to be a complete contract has never come into operative existence, (b) to impeach the consideration for the contract (7th ed., p. 62). "Though the terms of a bill or note may not be contradicted by oral evidence, yet, as between immediate parties, effect may be given to a collateral or prior oral agreement by cross-action or counterclaim" (7th ed., p. 65). The question is treated by Byles, 17th ed., p. 122. Referring to the section of the Act as to conditional delivery, the learned author says: "The effect of this provision is not to alter the rule of common law excluding parol evidence to vary a written agreement, but in conformity with the common law it allows, except as against a holder in due course, evidence to be given either that there was no delivery by the defendant with the intention of transferring property in the instrument, as where a bill was endorsed and delivered to be collected on a joint account, or that delivery was subject to the fulfilment of a condition suspending the operation of the instrument, and that the condition has not been fulfilled; in other words, that the instrument was a mere escrow."

Reference is made to the *Jefferies* and *Bell* cases already quoted, and to *Lindley v. Lacey* (1864), 34 L.J.C.P. 7. In that case Byles, J., said (p. 9): "There is here a prior agreement relating to a bill of exchange, with which the subsequent written agreement did not, in any way, interfere. The jury found that the defendant bound himself by a distinct oral agreement to take up Chase's bill, and upon this the written contract is wholly silent. *Harris v. Rickett* (1859), 4 H. & N. 1, is therefore precisely in point. But, independently of that case, there is a series of cases beginning with *Davis v. Jones* (1856), 17 C.B. 625, and *Pym v. Campbell* (1856), 6 E. & B. 370, and followed very recently in *Wallis v. Littell* (1861), 31 L.J.C.P. 100, in this Court, which shews that evidence may be given of an oral agreement which constitutes a condition on which the performance of the written agreement is to depend; and if evidence may be given of an oral agreement which affects the performance of the written one, surely evidence may be given of a distinct oral agreement

upon a matter on which the written contract is silent." See also Chalmers, 7th ed., p. 65.

Oral evidence is admissible to contradict the consideration or value of a bill or note, but not to vary the terms of the instrument: per Alderson, B., in *Foster v. Jolly* (1835), 1 C. M. & R. 703. See also *Abbott v. Hendricks* (1840), 1 Man. & G. 791; Halsbury's Laws of England, vol. 2, pp. 467, 483; *New London Credit Syndicate v. Neale*, [1898] 2 Q.B. 487. As to defective title see Halsbury, vol. 2, pp. 508, 817.

In *Commercial Bank of Windsor v. Morrison* (1902), 32 S.C.R. 98, it was held that a promissory note endorsed on the express understanding that it should only be available upon the happening of a certain condition is not binding upon the endorser where the condition has not been fulfilled; *Pym v. Campbell*, 6 E. & B. 370, followed. Strong, C.J., said: "The only title that the bank had to the notes in question was through Marshall, its agent, and it is impossible that they can be used by the bank except subject to the terms upon which the notes were delivered to the agent through whom it derived its title. It was known to Marshall that it had been agreed between Morrison and Smith that the notes should be available only upon the condition that some other responsible person should become surety. The agent took the notes subject to this condition, and it must be assumed that the bank also agreed to these terms." See also *Herdman v. Wheeler*, [1902] 1 K.B. 361.

Mr. Robertson relied upon *Abrey v. Crux* (1869), L.R. 5 C.P. 37, and *New London Credit Syndicate v. Neale* (*supra*), following *Young v. Austen* (1869), L.R. 4 C.P. 553, where it was held that evidence of a contemporaneous oral agreement to renew a bill of exchange was inadmissible, on the ground that its effect would be to contradict the terms of a written instrument. In *Young v. Austen* it was held that, as the agreement would not be a defence unless it was in writing, the plea must be considered as alleging a written agreement. In the case of *Abrey v. Crux*, to an action by the payee against the drawer of a bill of exchange, payable twelve months after date, the defendant pleaded that he drew the bill and delivered it to the plaintiff for the accommodation of the acceptor and as surety for him; that, at the time the

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defendant so drew and delivered the bill to the plaintiff, it was agreed between the plaintiff and defendant and the acceptor that the acceptor should deposit with the plaintiff certain securities, to be held by the plaintiff as security for the due payment of the bill, and that, in case the bill should not be duly paid, the plaintiff should sell the securities and apply the proceeds in liquidation of the bill, and that, until the plaintiff should have so sold the securities, the defendant should not be liable to be sued on the bill. The plea averred that the securities were deposited with the plaintiff by the acceptor, but that the plaintiff had not sold, but still held them. It was held, Willes, J., doubting, that oral evidence of the agreement alleged in the bill was not admissible, inasmuch as it contradicted or varied the express written contract on the face of the bill. Willes, J., after pointing out the distinction between this case and *Young v. Austen* and that class of cases, said: "I do not see why we should not make a precedent, to meet the circumstances and the merits of the particular case. . . . I do not see why we should not, in a novel case to which no distinct law is applicable, rather follow the justice of the case than strive to bring the case within a principle which will defeat justice. For these reasons, I entertain great doubt, though I do not feel so strongly on the subject as absolutely to dissent from the judgment of the rest of the Court." Keating, J., said: "I should have been desirous, like my brother Willes, if we could consistently have done so, to decide in favour of the admissibility of this evidence, because it is excluded only by reason of a rigid rule of law laid down for the general benefit of suitors, but which nevertheless in some cases works hardship. As far, however, as I am aware, upon the authorities on the subject of bills of exchange, it has always been laid down as an inflexible rule that you cannot by parol evidence contradict the terms of the written contract, though you may negative the consideration, as between the immediate parties." Brett, J., said: "I agree that the evidence was not admissible, because it did not impeach the consideration for the bill, or shew that it had failed." The report of the case does not state very fully what the facts were beyond the statement in the plea. In the argument H. James, Q.C., said: "There are many auth-

orities to shew that the intention of the parties to a contract may be shewn by a contemporaneous agreement, whether oral or written, provided such contemporaneous agreement does not vary or contradict or operate in defeazance of the contract declared on, but merely suspends the commencement of the obligation;" and referred to *Pym v. Campbell* and other cases.

This case, while it has been commented upon (see Byles on Bills, 17th ed., p. 122, and *Stott v. Fairlamb* (1883), 52 L.J.Q.B. 420), has not been overruled. Denman, J., in the last case, said: "I have considerable doubt whether that case is intended to go the full length of holding that an agreement to suspend the operation of a note 'payable on demand,' come to by the original parties to such a note, would be inconsistent with the note. There are expressions in the judgments in *Abrey v. Crux* upon which an argument to the contrary might be founded. But the case of *Woodbridge v. Spooner* (1819), 3 B. & Ald. 233, certainly does go that length, and seems to me to be entirely in point for the plaintiff. So far, then, as the case depends upon the establishment of a parol agreement contemporaneous with the note, to the effect that the note, though on the face of it payable on demand, should not be enforced for three years, I think the defendant's case fails, inasmuch as, although the jury have found a parol contract proved, such contract is immaterial and inoperative to contradict the terms of the note." It will be noticed that the note was payable on demand. In the present case the note was payable in 90 days after date. The agreement, therefore, that it should not be paid for three years, one would think, expressly contradicted the terms of the note. Bovill, C.J., in the *Abrey* case, points out (p. 42) that Mr. James in his argument relied mainly upon two authorities, namely, a passage in the judgment of Maule, J., in the Privy Council, in *Castrique v. Buttigieg* (1855), 10 Moo. P.C. 94, 108, and the case of *Wallis v. Littell*; and that in the *Castrique* case the facts shewed no consideration, and that the ground of the decision in *Wallis v. Littell* was, that, upon the facts, the oral agreement set up was not a variation or defeazance of the written agreement declared on, but was merely offered to shew that the written agreement was not to take effect until the happening of a given event.

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In my view, that was the effect of the agreement in the present case, namely, that the agreement operated as a suspension of the bill until it was ascertained that there was an indebtedness at the end of the term mentioned in the bill. The principle recognised in *Wallis v. Littell* was applied and followed in *Ontario Ladies' College v. Kendry* (1905), 10 O.L.R. 324, where it was held, affirming the judgment of the Chancellor, that, where contemporaneously with a written agreement there is an oral agreement that the written agreement is not to take effect until some other event happens, oral evidence is admissible to prove the contemporaneous agreement. See also *Brown v. Howland* (1885), 9 O.R. 48, 66, where it was held that there was no infringement of the rule as to the admission of parol evidence, for its effect was not to alter the note, but to shew that the condition upon which it was to become a note had not been performed—quoting Story in part as follows: “A promissory note, like other written contracts not under seal, may be delivered subject to oral agreement that it shall not take effect until a future time, or until something else has been done that the parties have agreed upon; and in such a case the instrument will have no operation until the condition or agreement has been performed, even if the delivery is made to the other party himself.”

In *Long v. Smith* (1911), 23 O.L.R. 121, it was held that parol evidence was admissible to prove the existence of a collateral agreement in the nature of a condition upon which the contract set up was entered into by the defendant. Evidence may be given of a prior or a contemporaneous oral agreement which constitutes a condition upon which the performance of the written agreement is to depend. The oral evidence may be such as to affect the performance of the written agreement, by shewing that it is not to be operative until the condition is complied with. *Henderson v. Arthur*, [1907] 1 K.B. 10, at p. 12, and *Lindley v. Lacey*, 17 C.B.N.S. 578, 587, are specially referred to. See also *Holmes v. Kidd* (1858), 28 L.J. Ex. 113.

In the present case, the bank had not only notice of the arrangement, but was a party to it, and the acceptance was only signed upon the distinct understanding that there was to be no liability unless there was an indebtedness from the defendants

at maturity of the bill. The bank was, therefore, in no better position than the New Hamburg Manufacturing Company, and was not a holder in due course for value. The bank had no right, in my opinion, to treat the bill as one for discount, nor was it, so far as the evidence shews, any part of the arrangement, so far as the defendants were concerned, that any advances should be made upon the faith of the acceptance. The bank, it is true, passed it through its books, in the form of a discount, and reduced the overdrawn account by so much, but that was a matter of bookkeeping. The bill was never in its hands as a holder for value without notice, under which it might claim payment in disregard of the condition upon which the acceptance was made. It was argued that the transaction as put forward by the defence was improbable because the bank would get no benefit out of it. This view is not correct. There was a very large indebtedness, in addition to the overdrawn account of the New Hamburg Manufacturing Company, to the bank, upon which the bank was likely to lose, as its local manager said, a large amount. The obtaining of this conditional acceptance operated in effect as an equitable assignment, by making the amount of \$2,500 become payable to the bank upon the acceptance of the machines by the defendants from the New Hamburg Manufacturing Company, and upon the amount due thereon becoming payable by the defendants.

In my view, the oral evidence was admissible to establish the condition upon which the defendants signed the acceptance.

There was some evidence given that there was no indebtedness from the defendants to the New Hamburg Manufacturing Company; but it was agreed that the decision of this question should stand over until the state of accounts was ascertained by the liquidator of the New Hamburg Manufacturing Company.

Judgment, therefore, will not issue until that question is settled. If it be found that there was no indebtedness, the plaintiffs' action should be dismissed with costs. If there was an indebtedness, the judgment should be for the plaintiffs with costs, for the amount of the bill, if so much is due, or such lesser sum as may be found due. (For such reduction see the *Holmes* case, *supra*.)

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[APPELLATE DIVISION.]

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SMITH V. HUMBERVALE CEMETERY CO.

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March 22.

Company—Cemetery Company—Power to Sell Lands not Required for Cemetery Purposes—Act respecting Cemetery Companies, R.S.O. 1887, ch. 175—Effect of Registration under secs. 2(b), 3—Status of Plaintiff in Action to Set aside Conveyance—Shareholder—Class Action—Estoppel—Re-incorporation of Company, under Companies Act, 2 Geo. V. ch. 31—Effect of sec. 13—Powers of Provincial Secretary—Trusts.

Previous to 1893, a number of persons, including the plaintiff S., formed themselves into a company under the provisions of the Act respecting Cemetery Companies, R.S.O. 1887, ch. 175; they acquired 50 acres of land, and signed a certificate, in the form prescribed by sec. 3 of the Act, and registered it in the proper registry office on the 14th April, 1893. With a view to obtaining power to sell a part of the 50 acres not used for burial purposes, the directors of the company, in 1912, applied to the Provincial Secretary, under sec. 11 of the Companies Act, 2 Geo. V. ch. 31, for re-incorporation; and letters patent re-incorporating the company were issued on the 18th October, 1912, which purported to give the re-incorporated company power to sell, alienate, and convey any of the lands held by the old company, and any other lands not required for the purposes of the company, if deemed necessary or expedient. The directors of the old company then transferred all its assets to the new company, and the new company sold and conveyed a part of the 50 acres to the defendant W. The plaintiffs contended that the new company had no power so to convey:—

Held, that the plaintiffs could maintain the action: the plaintiff S. was a shareholder, and entitled to sue on behalf of his class; the proceedings should be amended so as to shew that he so sued; the plaintiff S. was not, by reason of his participation in the movement for re-incorporation, estopped from attacking the conveyance.

2. That, when the certificate mentioned in secs. 2(b) and 3 of R.S.O. 1887, ch. 175, was registered, the company became a body corporate, and its land became subject to trusts inconsistent with a power to sell except for burial purposes: secs. 2, 12, 17, 32, 33.

3. That it was the duty of the old company to hold the land upon the trusts declared by the statute; and this duty attached to the new company, and might be enforced against it as though it had itself been subject to it *ab origine*: sec. 13 of the Companies Act, 2 Geo. V. ch. 31. The powers of the Provincial Secretary were strictly limited by the statute; and could not be considered to extend to granting authority to trustees to sell lands which they had in trust and to put the proceeds in their own or the shareholders' pockets.

Judgment of BRITTON, J., reversed.

THE plaintiffs, as lot-owners and shareholders in the Humbervale Cemetery Company, and on behalf of all other shareholders and lot-owners, brought this action: (1) to have a certain by-law of the original company declared void; (2) to have it declared that the petition of the Humbervale Cemetery Company, under the Ontario Joint Stock Companies Act, was not authorised by the shareholders of the Humbervale Cemetery

Company; (3) to have it declared that there was no right on the part of the cemetery company to sell part of their land to the defendant Winter; (4) for an injunction restraining the defendants from using the cemetery land otherwise than for cemetery purposes; (5) to compel Winter and the other defendants to restore the land to its former condition; and (6) for damages.

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The action was tried by BRITTON, J., without a jury, at Toronto.

E. F. B. Johnston, K.C., and *D. Inglis Grant*, for the plaintiffs.

G. H. Watson, K.C., and *G. A. Grover*, for the defendants.

December 12, 1914. BRITTON, J.:—What the defendants rely upon in answer to this action is fully set out in the statements of defence.

The facts, so far as they are material, in the view I take, are as follows.

The Humbervale Cemetery Company was, on the 14th April, 1893, regularly incorporated under the Act respecting Cemetery Companies, R.S.O. 1887, ch. 175, secs. 1 and 2.

The plaintiff Smith and others, shortly prior to the incorporation mentioned, acquired land, viz., 50 $\frac{5}{16}$ acres, as set out in the statement of claim for the purpose of a cemetery.

Having complied with the requirements of the Act last cited, the applicants for incorporation became “a body corporate under the name of the Humbervale Cemetery Company, with power to hold and convey the land to be used exclusively for cemetery purposes.”

It was argued that the old company, under their corporate powers—and as trustees acting in good faith—could, if any part of the original parcel of land became unsuitable or not required for burial purposes, sell such portion, not in any way interfering with lots sold to or acquired by any persons for burial lots. There is much force in the argument, where land originally acquired is found much too large for use reasonably required for burial purposes; but, because of what has taken place, I express no opinion upon that point.

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The company acquired $50\frac{5}{10}$ acres as described in the statement of claim. They subdivided a part into small burial lots, 10 x 10—some lots were larger and not rectangular.

Later on, they desired to sell a portion of their land not required, as the directors thought, for cemetery purposes. A price was fixed, and the defendant Winter was found as a person willing to buy at the price, but he questioned the right of the company to sell for purposes other than for cemetery purposes. The directors sought legal advice, and were told that the company might be re-incorporated under the Companies Act. The old company then applied for re-incorporation, under the Ontario Companies Act, 1912, 2 Geo. V. ch. 31.

The Humbervale Cemetery Company was one of those companies within the Act, as it was "a corporation incorporated for purposes and objects within the scope of the Companies Act." A cemetery company could be only Provincial—but it was brought directly under the Act by R.S.O. 1897, ch. 213, "An Act respecting Cemetery Companies." This applies to cemetery companies incorporated before the 1st day of July, 1897; and this company was incorporated in 1893, and was, at the time of application for re-incorporation, "a valid and subsisting corporation."

Letters patent were granted re-incorporating the company under the name of the Humbervale Cemetery Company Limited, on the 18th day of October, 1912.

The powers conferred are, "to carry on business as a cemetery company, and for that purpose to hold the lands now owned by the Humbervale Cemetery Company, and, if deemed necessary or expedient, to purchase or otherwise acquire and hold any additional lands for the purpose of the company, and with power to sell, alienate, and convey any of the said lands now held by the . . . company, and any other lands not required for the purposes of the company, if deemed necessary or expedient."

The last mentioned company, then, deeming it expedient and advisable to sell a portion of the land as not required for cemetery purposes, renewed negotiations with Ogden A. Winter, and a sale to him resulted.

A conveyance has been executed of the part he purchased,

and a mortgage given by Winter to the company for the balance of the purchase-money.

I am not able to give effect to the contention of the plaintiffs in this action. As to the objection to the by-law and that the petition was not authorised, these are cured by sec. 27 of the Ontario Companies Act, 1912.

The defendant Winter has apparently acquired a large amount—perhaps the greater part—of the stock of the company; of that the plaintiffs have no right to complain.

It was objected that the plaintiffs are not shareholders or lot-owners so as to entitle them to bring this action—I make no finding upon that issue.

I appreciate the desire of the plaintiffs and lot-owners to see the cemetery ground large and extensive as it was before the sale to Winter; but I may add that, according to the evidence, a great deal more care and attention could be given to the smaller enclosure than has been; and, beyond question, the smaller area is and will be sufficient for the burial during very many years of those whose friends will select this cemetery as a place of interment.

The order in council approved by His Honour the Lieutenant-Governor of Ontario dated the 22nd day of September, 1914, can have no effect as to what was done prior to its date—and, therefore, cannot operate as a stay of proceedings in this action.

I find that there were no false or fraudulent representations in this matter by any of the defendants, but that what has been done has been done in good faith.

The action will be dismissed with costs.

The plaintiffs appealed from the judgment of BRITTON, J.

March 3. The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

E. F. B. Johnston, K.C., for the appellants, argued that an incorporated cemetery company could not sell lands dedicated to the public without a special Act of the Legislature: R.S.O. 1887, ch. 175; 2 Geo. V. ch. 31, sec. 11; R.S.O. 1914, ch. 178, sec. 11. A cemetery should be treated as a whole, and no authority

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should be given to a cemetery company to deal with the ground except as the Act directs. Companies' Acts are not applicable to a cemetery company. The only way the land can be sold as a whole is under R.S.O. 1887, ch. 175, sec. 33. Cemetery property cannot be set aside for secular purposes: *Campbell v. Parishioners and Inhabitants of Paddington* (1852), 2 Rob. Ecc. R. 558; *Regina v. Twiss* (1869), L.R. 4 Q.B. 407, at p. 412; *Colbert & Kirtley v. Shepherd* (1892), 89 Va. 401; *Boyce v. Kalbaugh* (1877), 47 Md. 334; *Lay v. The State* (1894), 12 Ind. App. 362. He also referred to R.S.O. 1897, ch. 213, sec. 13, as shewing to some extent the intention of the Legislature with regard to cemeteries.

D. Inglis Grant, on the same side, referred to Halsbury's Laws of England, vol. 3, p. 533, foot-note (*t*); and distinguished *In re Ponsford and Newport District School Board*, [1894] 1 Ch. 454. On the question of *ultra vires*, he referred to Halsbury, vol. 5, p. 285, para. 466, and p. 288, para. 469; *Masten's Company Law* (1901), p. 89.

G. H. Watson, K.C., for the defendants, respondents, referred, on the question of the limitation of the right of action with reference to title, to *Adamson v. Adamson* (1878), 25 Gr. 550; *Dumble v. Larush* (1879), 27 Gr. 187; *Re Harper and Township of East Flamborough* (1914), 32 O.L.R. 490, and cases cited there. [RIDDELL, J.:—All that the cases say is, that the right of a plaintiff is to be determined as of the teste of the writ of summons.] The plaintiffs have no status in Court. A plaintiff may by concurrence estop himself: *Christopher v. Noxon* (1883), 4 O.R. 672, at p. 680. The Act respecting Cemetery Companies was amended in 1897: 60 Vict. ch. 42; see 2 Geo. V. ch. 31, secs. 11, 12; sec. 13 does not take away our charter rights given us in sec. 12; sec. 13 may be regarded as a reference to the rights of third persons, as the marginal note indicates; sec. 16, sub-sec. 2, secs. 27, 29, 207. As to the effect of the order in council referred to by the trial Judge, see Halsbury's Laws of England, vol. 7, p. 8, and vol. 27, p. 123; *Craies' Statute Law*, 2nd ed., pp. 278, 283. An amendment by the plaintiffs could not properly be allowed to introduce a ground of action arising after the commencement of the action: Rules 130,

159; *McLean v. McLean* (1897), 17 P.R. 440; *Tottenham Local Board of Health v. Lea Conservancy Board* (1886), 2 Times L.R. 410. Hence the order in council is not before the Court: *Masten's Company Law* (1901), pp. 269-271, 275, where there is a reference to Lindley on Companies, 5th ed., p. 599; *Attorney-General for Ontario v. Toronto Junction Recreation Club* (1904), 4 O.W.R. 72.

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G. A. Grover, on the same side, emphasised the importance of the provisions of R.S.O. 1887, ch. 175.

Johnston, in reply, referred briefly to the evidence.

March 22. RIDDELL, J.:—Some time before 1893, a number of persons, including the plaintiff Smith, formed themselves into a company under the provisions of R.S.O. 1887, ch. 175, sec. 1. Acquiring a suitable piece of land, some 50 acres in extent, outside of the city, they signed a certificate, in the form prescribed by sec. 3 of the Act just mentioned, and registered it in the proper registry office on the 14th April, 1893. The company took the name (in the certificate) of the Humbervale Cemetery Company; it sold a large number of burial sites, and many interments took place in the cemetery.

Apparently the land, which in 1893 was best adapted for a burial-ground, in the lapse of time became valuable for other purposes, and the "members" or some of them became desirous of selling the land yet unused or a considerable part of it. One Dr. Winter desired to purchase, and acquired by purchase the shares of a majority of the members. On the 15th January, 1912, after a dividend of one per cent. had been directed to be paid, the board of directors instructed the president to sell the "cemetery lands and the interest of the said cemetery company at the rate of 50 per cent. of the par value of the stock," and an amount sufficient to pay expenses "that the company may be put to in getting power to sell;" his own commission he was to get from the vendee.

On the 8th April, an offer made by Dr. Winter was laid before the board, and not dealt with. On the 4th September, 1912, the matter being under consideration, the board decided to apply for letters patent re-incorporating the company under the

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name of the Humbervale Cemetery Company Limited, and passed a by-law to that effect. This was approved at a meeting of shareholders on the 19th September, 1912. A petition was accordingly filed with the Provincial Secretary asking letters patent, and setting out that "the object for which incorporation is sought is to carry on business as a cemetery company, and for that purpose to hold the lands now owned by the Humbervale Cemetery Company, and, if deemed necessary or expedient, to purchase or otherwise acquire and hold any additional lands for the purposes of the company, and with power to sell, alienate, and convey any of the said lands now held by the . . . company, and any other lands not required for the purposes of the company, if deemed necessary or expedient." The name of the re-incorporated company to be the Humbervale Cemetery Company Limited. It would appear that the real purpose of the re-incorporation was to obtain power to sell the land not theretofore used for burial, or part of it; but I do not think this material. On the 18th October, 1912, the Provincial Secretary gave a re-incorporating charter with the power as requested.

The directors of the old company thereupon transferred all its assets to the new company, and shortly thereafter the new company gave a deed of part of the land to Dr. Winter.

The plaintiff Smith was, as has been said, one of the original incorporators of the cemetery company, and became a shareholder in the new company. Barlow is the owner of a burial lot. These two, with one Robertson—as to whom there is no evidence—began this action, on the 24th July, 1913, against the two companies, Paterson, the president, and Fraser, the secretary, of the new company, and Dr. Winter, alleging in effect that the new company had no power to convey the land to Winter, and claiming consequent relief. Pending action, an application was made to the Provincial Secretary, and an order in council was issued, on the 22nd September, 1914, that all the powers of the new company, save and except those possessed by the old company, should be as from the date of the re-incorporating charter suspended until further order.

No proceedings in the nature of a *sci. fa.* have been taken. The Attorney-General is not a party, and has not been asked, nor has he agreed, to lend his name to these proceedings.

The case came down for trial before Mr. Justice Britton without a jury at Toronto, and that learned Judge dismissed the action with costs. The plaintiffs now appeal.

The plaintiffs suing not only for themselves but for all others in their class, it has been decided more than once, both in England and Ontario, that that fact should appear in the style of cause: see Rule 5 (1). But this may and should be amended.

The *locus standi* of the plaintiffs is attacked. Smith seems to have taken part in the movement to obtain the new charter; and, if the act of the new company here complained of were the obtaining of the new charter, there might be reason in holding Smith to be estopped. But the participation in one improper act of the company is no bar to a shareholder objecting to another, even of the same kind. He may undoubtedly object if the second is claimed to be *ultra vires*: *Mosely v. Koffyfontein Mines Limited*, [1911] 1 Ch. 73; *Koffyfontein Mines Limited v. Mosely*, [1911] A.C. 409. And here the act is wholly different from that in which it is said Smith took part.

Where the act is *ultra vires* in the strict sense, one shareholder may sue: *Simpson v. Westminster Palace Hotel Co.* (1860), 8 H.L.C. 712; and may of course sue for others in his class as well: *Russell v. Wakefield Waterworks Co.* (1875), L.R. 20 Eq. 474; *Burland v. Earle*, [1902] A.C. 83, and cases cited.

The plaintiff Barlow bought a lot before the granting of the new charter, but I do not decide as to his position, that of Smith being ample to support this action.

Nor do I proceed upon any supposed sacredness of the cemetery. What the company propose to do is wholly repugnant to my sense of propriety, but it is their legal right we must investigate—not their good taste and regard for the feelings of others.

The law in England as to graveyards I disregard. The parish graveyard has its own law, but this cemetery is a pure creation of the statutes, and we must look to the statutes for the law applicable.

The company, being formed under sec. 1 of R.S.O. 1887, ch. 175, could do what it pleased with its land by the unanimous consent of its members; it was not a corporation, but an ordinary company or partnership. But, when the certificate mentioned

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in secs. 2 (b) and 3 was registered, a very great change took place: "The company shall thenceforth become and be a body corporate," with a corporate existence. Any debts thereafter incurred were not chargeable against the individual members; the "company" is vested with powers of compulsory expropriation (conditionally): sec. 32; and receives the benefit of the Winding-up Act if it desire to be wound up. But the land also changes its character: before registration it is the property of the company to do with as it pleases, but thereafter the company "may take, hold and convey the land to be used exclusively as a cemetery or place for the burial of the dead" only (sec. 2); the land can "be freed . . . from . . . trusts arising on account of its having been held for the purposes of a cemetery or cemetery company," by being sold in a winding-up proceeding: sec. 33; but not otherwise.

And the land is not wholly in the company's control even as to who shall be buried in it: "strangers and . . . the poor of all denominations" must be furnished with a grave "free of charge:" sec. 12. The land may be sold for burial sites, and the money employed in repaying to any member who does not desire to take land to the full extent of his stock, interest or paid-up stock, not exceeding eight per cent. per annum, and also repay the paid-up stock: sec. 17(1); but, "except as aforesaid, no dividend or profit of any kind shall be paid by the company to any member thereof:" sec. 17 (3).

The land—all the land and not a part of it—is held in trust for the benefit of the stranger and the poor, as well as those who may desire to buy a place for their dead to sleep. All this is wholly inconsistent with a power to sell (except for burial sites sold to individual proprietors.)

The next question is the effect of the re-incorporation, which was under 2 Geo. V. ch. 31—for convenience I refer to the R.S.O. 1914, ch. 178, which is a consolidation of that statute without change of terminology.

Section 11 enables the company to make an application to the Lieutenant-Governor, and the Lieutenant-Governor (or the Provincial Secretary—sec. 4) to grant letters patent; by sec. 12 the power of the corporation may be limited or extended to such

other objects as the petitioner may desire. I shall assume that the power to sell the land to Dr. Winter was intended to be asked for, and that the Provincial Secretary intended by his charter to grant the power. I think, however, that this is not justified by the words of the section, and that the Legislature could not have intended, by such general words, to enable an officer of the Crown to give power to trustees to sell lands they have in trust and put the proceeds in their own pockets, or the pockets of the shareholders; the proper execution of the trust requiring the trustees to hold the land. This becomes clear when we read the next section.

Section 13 seems to me to prevent such a power being exercisable: "All debts, contracts, liabilities and duties of such corporation shall thenceforth attach to the new . . . corporation, and may be enforced against it to the same extent as if such debts, contracts, liabilities and duties had been incurred or contracted by it."

That it was the plain duty of the former corporation to hold this land upon the trusts declared by the statute is clear; and I think that this duty attaches to the new corporation, and may be enforced against it as though it had itself incurred this duty *ab origine*.

The marginal note is referred to as against this interpretation. A marginal note is no part of a statute: 3 & 4 Geo. V. ch. 2 (an Act respecting the Revision and Consolidation of the Statutes of Ontario), sec. 9 (4); *Duke of Devonshire v. O'Connor* (1890), 24 Q.B.D. 468; *Sutton v. Sutton* (1882), 22 Ch. D. 511; though it may sometimes be of some assistance to shew the drift of a section: *Bushell v. Hammond* (1904), 73 L.J.K.B. 1005; *Nicholson v. Fields* (1862), 31 L.J. Ex. 233, 7 H. & N. 810.

It would, in my view, be giving too narrow an interpretation of this section to limit it to the claims of creditors.

This section was not brought to the attention of my brother Britton, as it should have been, and it is upon it that I would base my opinion. It is common ground that the powers of the Provincial Secretary are limited strictly by the statute.

I would allow the appeal, and give judgment for the plaintiffs, with costs throughout. The exact form of the order may be spoken to if necessary.

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FALCONBRIDGE, O.J.K.B.:—I agree.

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LATCHFORD, J.:—The whole 50 acres, and not merely that part of it in which lots were sold and interments made, constituted “the cemetery” which the original company was bound to use “exclusively as a place for the burial of the dead.” But limited dividends were to be paid out of the proceeds of the sale of lots; and any surplus was to be devoted to “preserving and embellishing the land as a cemetery:” R.S.O. 1887, ch. 175, sec. 2 (*d*) and sec. 18. Graves were to be furnished gratis for strangers and the poor: sec. 12.

For 20 years the company conducted the cemetery in accordance with the Act under which it became incorporated. Burial-lots were, however, sold but in a small area of about 6 acres. By 1912 the demand for suburban property for building or speculative purposes had given the unsold part of the cemetery an enormously enhanced value. Dr. Winter, by acquiring a majority of the shares, obtained control of the company, and on the 8th April, 1912, made an offer to purchase part of the company’s lands. The company, however, had no power to sell except for burial purposes. What it could and did do in October, 1912, was to apply for and procure re-incorporation under sec. 11 of the Ontario Companies Act, 2 Geo. V. ch. 31, now R.S.O. 1914, ch. 178. As re-incorporated, the company seemed all that Dr. Winter could desire. The loathsome obligations which clung to it in its former state of existence had, it was thought, been put aside. The new being stood endowed with ample powers, and proceeded to display them. The offer to purchase made to the old company was accepted, and all resolutions, by-laws, and agreements thought necessary to make valid the transaction were made by the directors and ratified and confirmed by the shareholders, *quorum magna pars* was the doctor himself.

Notwithstanding the general words contained in sec. 12, enabling the Lieutenant-Governor by the letters patent to extend the powers of the company “to such other objects . . . as the applicant desires,” it is, I think, clear that such powers cannot be extended so as to conflict with obligations imposed on

the company by statute. Section 13 of the Act (now sec. 13 of R.S.O. 1914, ch. 178) provides that "all . . . liabilities and duties of such" (in this case the original) "corporations shall . . . attach to the new or re-incorporated corporation and may be enforced against it to the same extent as if such . . . liabilities and duties had been incurred . . . by it."

The liabilities and duties imposed by statute on the former company remain; and one at least of the plaintiffs has established a status to insist that the new company shall continue to discharge them.

I would therefore allow this appeal with costs.

KELLY, J.:—The defendants rely upon the powers assumed to be given the Humbervale Cemetery Company Limited in the letters patent of re-incorporation, to support the position that that company has the right to effect the sale of the lands now in question.

When the incorporators of the original company, the Humbervale Cemetery Company, complied with the requirements of sec. 2 of R.S.O. 1887, ch. 175, then in force, as to subscription for stock, payment on account of the stock subscriptions, and the execution and registration of the required instrument, they became a body corporate with power to "take, hold and convey the land to be used exclusively as a cemetery, or place for the burial of the dead." That corporation did acquire land—part of which is the land now in question—and sold from it burial plots, many of which were actually used for burial purposes. There came a time, however, when it was thought desirable to sell outright, and not for burial purposes, the remaining lands, or perhaps a part of them; and it seems to have been recognised that the powers then possessed did not go so far as to authorise a sale such as the corporation desired to make. Application was then made for re-incorporation under the provisions of 2 Geo. V. ch. 31 (the Ontario Companies Act); and, accordingly, letters patent were issued bearing date the 18th October, 1912, to the Humbervale Cemetery Company Limited, for the purposes and objects of carrying on business as a cemetery company, and "for that purpose to hold the lands now owned by the Humbervale

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Cemetery Company, and, if deemed necessary or expedient, to purchase or otherwise acquire and hold any additional lands for the purposes of the company, and with power to sell, alienate, and convey any of the said lands now held by the . . . company, and any other lands not required for the purposes of the company, if deemed necessary or expedient."

Relying on these powers, the new company, to which the lands of the earlier company have been transferred, purported to make a sale, the validity of which is in these proceedings attacked; and as a defence they claim the right to make such sale unaffected by the limitations to which the older company was subject. That company had a restricted right to convey—it could convey land to be used exclusively as a cemetery or place for the burial of the dead. There was also under R.S.O. 1887, ch. 175, a further power of selling the lands free from the trusts arising on account of its having been held as a cemetery, in the event of the winding-up of the company. That, of course, does not apply here.

The letters patent cannot be taken without considering as well the terms of the statute by which their issue is authorised. Section 13 of that statute, 2 Geo. V. ch. 31, provides that "all rights of creditors against the property, rights and assets of a corporation amalgamated or re-incorporated under the provisions of this Act, and all liens upon its property, rights and assets shall be unimpaired by such amalgamation, or re-incorporation, and all debts, contracts, liabilities and duties of such corporations shall thenceforth attach to the new or re-incorporated corporation and may be enforced against it to the same extent as if such debts, contracts, liabilities and duties had been incurred or contracted by it."

The removal of the restriction upon selling which existed under the former incorporation would be a most serious interference with the conditions under which the old company became entitled to hold, and purchasers of burial lots made their purchases; and such removal should not be held to be effected, unless upon the clearest and most unequivocal language. In the absence of such language, there should be no assumption that the former limitations no longer exist. Not only is such language wanting, but

sec. 13 clearly expresses the intention of the Legislature that the re-incorporation should not relieve the new corporation from the liabilities and duties to which the earlier corporation was subject. That being so, the attempted sale cannot be upheld.

It does not appear from his reasons for judgment that this important provision was urged before or brought to the attention of the learned trial Judge.

The status of the plaintiffs with respect to their right to maintain this action is also questioned. The plaintiff Smith was one of the incorporators of the original company, and he is a shareholder of the re-incorporated company. The objection to his right to maintain the action cannot, therefore, be supported.

On the grounds I have so far dealt with, the plaintiffs are entitled to succeed. The other grounds put forward in opposition to the plaintiffs' position are not so established as to constitute a valid defence.

The appeal should be allowed with costs here and below.

Appeal allowed.

[APPELLATE DIVISION.]

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March 22.

Principal and Agent—Undisclosed Principal—Action against both—Judgment Recovered against Agent upon Default—Bar to Prosecution of Action against Principal—Judgment not to be Set aside except on Consent of Principal—County Court Appeal—Final Order—County Courts Act, R.S.O. 1914, ch. 59, sec. 40(2).

The plaintiffs sued the three defendants in a County Court for the price of lumber sold and delivered. The special endorsement of the writ of summons set out the particulars of the plaintiffs' claim, and no distinction was made among the defendants—all three being sued as if liable in the same way. The defendant T. did not appear, and judgment for the whole amount claimed was entered against him upon his default being shewn. The defendants L. and C. appeared and filed affidavits under Rule 56. The plaintiffs then delivered a statement of claim, which in substance stated that the defendant L. and the defendant C.'s testator had in partnership built a number of houses, and had employed the defendant T. to do the lathing; that T. had bought from the plaintiffs the lumber for which payment was sought; that the plaintiffs had recovered judgment against T.; and they asked that, if it should appear that L. and C. were liable as principals, the judgment against T. should be set aside. Upon a motion by L. and C. to strike out the statement

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 THOMPSON. Held, also, that the case presented by the statement of claim was that the defendants L. and C. were undisclosed principals of the defendant T.; the judgment against the defendant T., the alleged agent—though a judgment upon default—was a bar to the prosecution of the action against the principals; and, the cause of action having passed into a judgment, this judgment could not be set aside without the consent of the principals.
- Morel Brothers & Co. Limited v. Earl of Westmorland*, [1903] 1 K.B. 64, [1904] A.C. 11, 14, *McLeod v. Power*, [1898] 2 Ch. 295, and other cases, referred to.
- Discussion and explanation of the different classes of cases in which actions are brought against principals and agents.
- Partington v. Hawthorne* (1888), 52 J.P. 807, explained.

APPEAL by the defendants Levy and Crerar from an order of the Junior Judge of the County Court of the County of Wentworth, in an action in that Court, setting aside the judgment entered by the plaintiffs, upon default, against the defendant Thompson, and allowing the plaintiffs to amend their statement of claim and the writ of summons.

The following statement of the facts is taken from the judgment of RIDDELL, J.:—

The plaintiffs, a company carrying on business in Hamilton as lumber dealers, on the 23rd October, 1914, issued a writ against Thompson, Levy, and Mrs. Crear (as executrix) for \$319.12 for goods sold and delivered, and for interest. The endorsement reads:—

“The following are the particulars:—

“1912, Aug. 17. To 73900 No. 2 white pine
 lath at \$3.80 \$280.82

“To interest thereon from Nov. 20, 1912, when
 same became due, to Oct. 20, 1914, at 7 per
 cent. per annum, the defendant having
 agreed to pay interest at the said rate on
 all due accounts 38.30

“And the plaintiffs claim \$319.12

and interest on \$280.82 from the date hereof until judgment, at the rate aforesaid."

The defendants Levy and Mrs. Crerar entered an appearance, but Thompson did not; and on the 3rd December, 1914, judgment was entered against him on default of appearance for \$320.77 and \$21.30 costs.

The affidavits filed by the defendants Levy and Mrs. Crerar, under Rule 56, were in the same form—that they had a good defence to the action on the merits; that they did not purchase or order the goods; that they did not agree to pay for them, and the goods were not delivered to them.

The plaintiffs delivered a statement of claim, which in substance sets out that Levy and Mrs. Crerar's testator had been in partnership to build a number of houses, and had employed Thompson to do the lathing; that Thompson had bought from the plaintiffs the goods the price of which is sued for; that the plaintiffs had signed judgment against Thompson by default; but that if it should appear that Levy and Mrs. Crerar are liable as principals, the plaintiffs ask that the judgment should be set aside as against Thompson.

The defendants Levy and Mrs. Crerar served notice of a motion to strike out the statement of claim, on the ground that it disclosed no cause of action, and to dismiss the action against them accordingly. On this motion the Junior Judge of the County Court of the County of Wentworth, *in invitum* these defendants, made the following order:—

"1. It is ordered that the default judgment signed and entered against the defendant P. E. Thompson be and the same is hereby set aside and vacated without costs.

"2. It is further ordered that the plaintiffs be at liberty to amend their statement of claim and writ of summons herein as they may be advised, within one week from the date of this order."

These defendants now appeal.

March 9. The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

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W. E. B. Coyne, for the appellants. The order appealed from was made on a motion for final disposition of the action as well as for leave to amend. The statement of claim is against the defendants in the alternative. As to the right of appeal, see *Baptist v. Baptist* (1892), 21 S.C.R. 425. Rule 37 of the Rules of Practice, 1913, is not applicable: see *Holmsted's Ontario Judicature Act*, 4th ed., p. 380; the *White Book* for 1914, p. 135, where the English Rule is shewn to be practically the same. On the question of suing in the alternative and conclusive election, see *Morel Brothers & Co. Limited v. Earl of Westmorland*, [1904] A.C. 11, at p. 14; *Campbell Flour Mills Co. Limited v. Bowes* (1914), 32 O.L.R. 270, and cases cited there; *Cross and Co. v. Matthews and Wallace* (1904), 91 L.T.R. 500. In any event, the plaintiffs should not be allowed to make an amendment to their statement of claim so as to assert a claim obviously inconsistent with their original claim.

H. S. White, for the plaintiffs, respondents, argued that the order appealed from was a purely interlocutory order, allowing the plaintiffs to amend their pleadings, and was therefore not appealable. The defendant Thompson entered no appearance, and judgment went against him by default. By order of the County Court Judge, the plaintiffs were allowed to set aside their judgment, so as to be at liberty to proceed against the other defendants; and this is not a final disposition of the action: the County Courts Act, R.S.O. 1914, ch. 59, sec. 40, subsec. 2; *Leonard v. Burrows* (1904), 7 O.L.R. 316; *Re Taggart v. Bennett* (1903), 6 O.L.R. 74; *Jones v. Insole* (1891), 64 L.T.R. 703, is distinguishable, the English practice being different: see *Smith v. Traders Bank* (1905), 11 O.L.R. 24; *F. J. Castle Co. Limited v. Kouri* (1909), 18 O.L.R. 462. As to the effect of the judgment against the defendant Thompson, he referred to *Partington v. Hawthorne* (1888), 52 J.P. 807.

March 22. The judgment of the Court was delivered by RIDDELL, J. (after setting out the facts as above):—It is quite clear from the pleadings and statements before us that the real claim of the plaintiffs is this: “We sold lath to Thompson; we

do not know whether the other defendants are undisclosed principals; if they are, we claim judgment against them; and, to enable us to obtain that judgment, we ask to have the default judgment set aside; but, if they are not, we want judgment (already had) against Thompson."

There are two common cases in transactions of this kind; and much confusion, reaching into the cases and occasioning no little inaccuracy of statement, has arisen from the want of careful distinction between the principles upon which is based, in the two cases, the refusal of the Court to grant more than one judgment.

The first case is this: A., representing himself, expressly or by implication, as the agent of B., buys from C. goods in the name of and ostensibly for B.; the goods are "bargained and sold" to B., and credit is given to B. Payment being demanded, B. may acknowledge or ratify the agency of A.; if so, *cadit questio*, no action lies against A.; C. must fight it out with B.

Or B. may deny the agency of A., then C. may (1) sue B. on the contract, in which case he will succeed only if he prove A.'s agency, or (2) sue A., not on the contract—for the goods were not sold to him—but on the implied contract that he had authority to act for B. The action may indeed be laid in tort for fraud. In this case he will succeed only if he fails to prove A.'s agency. The causes of action are wholly different. The one is on the contract for "goods bargained and sold, goods sold and delivered," and would, in the old practice, be sued for on the "common counts." The other is on a different contract (or on a tort), and would have been the subject of a special count. As they are different, the judgment on one does not merge the other: if and when the one *transit in rem judicatam*, the other is wholly unaffected. It is not on the principle of merger that the Court would not allow a judgment against both, but on the principle that the Court could not allow a plaintiff to have two judgments based on two contradictory and inconsistent sets of facts. Accordingly, if the plaintiff sued the ostensible agent, he could succeed only if the agent had no authority, and therefore there was no contract with the alleged principal; then,

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if judgment were obtained against the agent, the Court could not allow a judgment against the principal. The cause of action, if any, against the principal, however, is not merged, *non transivit in rem judicatam*; there is no reason why an action should not be brought upon it; but, before any judgment can be had on it, the former judgment must be got out of the way. *Allegans contraria non est audiendus*.

Such was the case in *Partington v. Hawthorne*, 52 J.P. 807. Miss Hawthorne was the lessee of the Princess's Theatre. One Kelly, representing himself as acting for the Princess's Theatre, ordered some goods for the theatre from the plaintiff. "The goods were sold and delivered to, and were debited against, the Princess's Theatre." They were sold on the credit of the theatre, and Miss Hawthorne did not deny receipt of them. For some reason which does not appear, Kelly was sued; on default, judgment was signed against him. This, of course, was necessarily on the hypothesis that he had not the authority to act for the lessee. The lessee was then sued, as she might well be. Any cause of action against her had not been merged. The Master gave her unconditional leave to defend. Sir James Hannen varied that order by giving her leave to defend on payment of the amount into Court. The defendant appealed, and then the plaintiff had the Kelly judgment set aside. The Divisional Court, Pollock, B., and Manisty, J., upheld Sir James Hannen's order: Pollock, B., on the ground that the action against Kelly was obviously a mistaken proceeding, and should from the first have been against Miss Hawthorne (that is, Kelly was not, and Miss Hawthorne was, the Princess's Theatre). Manisty, J., says that she did not deny the receipt of the goods which were sold and delivered to and were debited to the Princess's Theatre, although ordered by Kelly.

This case is wholly intelligible and undoubted law, on the principles I have laid down. The judgment against Kelly rested on the claim that he had no right to buy for the Princess's Theatre unless he (1) was the Princess's Theatre himself, or (2) was authorised to buy for the person who was the Princess's Theatre. The action against Miss Hawthorne rested upon the

facts that (1) she was the Princess's Theatre, and (2) Kelly was authorised to buy for the theatre. These two sets of facts were wholly inconsistent, and the Court could not permit the plaintiff to have judgment on both hypotheses. But there was no merger of the claim against Miss Hawthorne, and once the judgment against Kelly was out of the way, the action against her could proceed.

That this obstacle to an action against Miss Hawthorne did not need to be removed before action brought, is certain. It will be sufficient to refer to *Re Harper and Township of East Flamborough* (1914), 32 O.L.R. 490, and cases there cited.

Instead of suing either the alleged principal and ostensible agent separately, (3) both may be sued in one action. But the causes of action are still distinct: against the principal, for "goods sold and delivered;" against the agent, on a special count in contract or tort. If at the trial the agency is established, the plaintiff will have judgment against the principal—if not, against the agent. He has no choice; no question of election arises; he must take the judgment the facts justify.

The other case, which has an outward resemblance but is different in principle, is this. A. goes to C. and buys goods ostensibly for himself. Credit is given to him. C. then discovers (as he believes) that B. is the real purchaser, and A. only an agent for his undisclosed principal, B. C. (1) may sue A., and will succeed if he proves the sale only; or (2) may sue B., when he will succeed if he prove A.'s agency. In either case the action is the same, for "goods bargained and sold, and sold and delivered;" there is only one cause of action, the one contract: a contract to which C. is one party and either B. or A. (at C.'s option) the other. If he take judgment against either, the contract *transit in rem judicatam* and is merged, gone. He cannot thereafter say that the contract is in existence. Nor can he, having taken a judgment against one, revive against the other the dead contract; it stays dead. There is indeed no objection to suing the agent and principal in separate actions; it is not the writ which merges the contract, but the judgment; and, so long as the plaintiff stops short of a judgment, he can proceed safely with the other action.

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The plaintiff may accordingly sue both in one action; but here, differing from the case first put, the cause of action is one and only one, and it is for that reason that he can have only one judgment. If, at the trial, he prove that B. is in reality the principal, he may take judgment against B., but he has the choice or an "election," nevertheless, to take it against A., the agent and actual purchaser. If he elect to take the judgment against A., *transit in rem judicatam*, and he cannot get judgment against B. In like manner, he cannot take judgment against B. and then get judgment against A. One or other, but not both, is the party to the one and only contract upon which he has sued.

The law has so recently been discussed by the Court in *Campbell Flour Mills Co. Limited v. Bowes*, 32 O.L.R. 270, that it is unnecessary to say more on this point.

The present case is the case of an alleged undisclosed principal, and it is quite clear that, where the agent has been sued and judgment taken against the alleged agent, this operates as a bar to the prosecution of the action against the principal, even if the judgment be by default: *Morel Brothers & Co. Limited v. Earl of Westmorland*, [1903] 1 K.B. 64, [1904] A.C. 11; see especially p. 14; *French v. Howie*, [1905] 2 K.B. 580, [1906] 2 K.B. 674; *Cross and Co. v. Matthews and Wallace*, 91 L.T.R. 500, 117 L.T. Jour. 220.

The cause of action having passed into a judgment, *transit in rem judicatam*, and this judgment cannot be set aside without the consent of the principal. "There cannot be more than one judgment on one entire contract." See especially *McLeod v. Power*, [1898] 2 Ch. 295; *Hammond v. Schofield*, [1891] 1 Q.B. 453; *In re Hodgson* (1885), 31 Ch. D. 177.

The only other question to consider is, whether the order appealed from is "final in its nature," not "merely interlocutory," under R.S.O. 1914, ch. 59, sec. 40 (2).

The application was, in substance, for a determination of the action against Levy and Mrs. Crerar, upon the ground that it could not be legally prosecuted against them further; that is, that the facts alleged in the statement of claim did not consti-

tute a cause of action. The decision of the Court below is, that these facts do give a cause of action—that the defendants have not a perfect defence on the plaintiff's own shewing. This is final in its nature, though it may be in form interlocutory.

In *Smith v. Traders Bank*, 11 O.L.R. 24, the County Court Judge had struck out certain paragraphs of a statement of defence as disclosing no reasonable answer. On appeal, a Divisional Court decided that this was an order final in form within the meaning of the statute.

In the present case, the County Court Judge has decided that the facts alleged in the statement of claim do give a cause of action. There can be no sound distinction between the cases. I am of opinion that the County Court Judge should have acceded to the defendants' motion, and dismissed the action as against them with costs.

The appeal should be allowed with costs, and the action dismissed with costs; the judgment against Thompson to stand.

No case is made for amendment, nor is there any pretence that the facts are not as stated.

Appeal allowed.

[APPELLATE DIVISION.]

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Life Insurance—Policy—Non-forfeiture Clause—Construction—“Cash Surrender Value” — Determination by Insurance Company at Stated Periods—Promissory Note Given for Part of Premium—Non-payment Renewal—Pleading—Amendment—Waiver—Policy not in Force at Death of Assured—Costs of Appeal—Incorrect Material.

Held (reversing the judgment of BRITTON, J., *ante* 68), that “the cash surrender value” mentioned in clause 9 of the defendants' policy upon which the plaintiff sued—clause 9 providing for non-forfeiture in the event of default in payment of any premium if the cash surrender value should exceed the amount of such premium—was the cash surrender value mentioned in the table of guaranteed loan and surrender values which followed clause 10 in the policy; that the defendants had the right to fix and had fixed the surrender value for the purposes of the policy at the end of every year; and that the surrender value fixed at the end of any one year continued to be the surrender value until increased at the end of the next year, according to the table.

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Held, also, that the defendants were entitled to succeed upon the defence that a promissory note, made by the assured and not paid at maturity, was "given for any premium or part thereof," within the meaning of another clause in the policy, although it was in fact made in part renewal of an earlier note which was undoubtedly given in part payment of a premium.

McGeachie v. North American Life Assurance Co. (1894), 23 S.C.R. 148, followed.

Per RIDDELL, J.:—The defendants were entitled to rely upon the last-mentioned clause of the policy without pleading it specially. But, if it were necessary to plead it, the defendants should be allowed to amend; for they had specially pleaded the facts relied upon; the plaintiff was not taken by surprise; and the defendants had not waived any defence based upon the clause referred to.

Lake Erie and Detroit River R.W. Co. v. Sales (1896), 26 S.C.R. 663, 677, referred to.

Held, therefore, that the policy was not in force at the time of the death of the assured, and the plaintiff could not succeed.

Per FALCONBRIDGE, C.J.K.B., and RIDDELL, J.:—The material furnished to the Court by the defendants upon the appeal was incorrect, and the defendants, though successful, should be deprived of the costs of the appeal, as in *Re Stinson and College of Physicians and Surgeons of Ontario* (1912), 27 O.L.R. 565.

APPEAL by the defendants from the judgment of BRITTON, J., *ante* 68.

February 12. The appeal was heard by FALCONBRIDGE, C.J. K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

G. H. Watson, K.C., for the appellants. Section 95 of the Dominion Insurance Act, 1910, ch. 32, does not apply to the policy in question, which was issued before that Act came into force. *Pense v. Northern Life Assurance Co.* (1907), 15 O.L.R. 131, where the Court of Appeal reversed the judgment of Mabee, J., 14 O.L.R. 613, is conclusive for the appellants. As to the effect of the promissory note, see *McGeachie v. North American Life Assurance Co.* (1892-4), 22 O.R. 151, 20 A.R. 187, 23 S.C.R. 148; *Manufacturers' Life Insurance Co. v. Gordon* (1893), 20 A.R. 309; *Frank v. Sun Life Assurance Co.* (1893-4), 20 A.R. 564, 23 S.C.R. 152 (note.)

W. H. Gregory, on the same side. "Cash surrender value" has a definite meaning; it is the sum to be paid on the lapse of a policy; the learned trial Judge was wrong in holding that the surrender value increased *de die in diem*.

R. S. Robertson and *J. A. Scellen*, for the plaintiff, respondent. Cash surrender value is the amount that a policy is worth to an insurer in cash at any time during the term of the

policy. See the explanation in Bunyon's Laws of Life Assurance, 4th ed., p. 141. Policies must be construed, where doubt arises, against the insurance companies: Porter's Laws of Insurance, 5th ed., p. 34. An insurance company is required, by way of illustration merely, to put the table at the foot of the policy, so that the assured may see what he is getting: 9 & 10 Edw. VII. ch. 32, sec. 95. The superintendent is to compute the surrender value: sec. 106. On the interpretation of "surrender value," see *Warren v. Postal Life Insurance Co.* (1914), 44 Ins. L.J. (Am.) 352. The cases cited for the defendant company must be distinguished, as different words are used in this case. The phrase "shall not be in force and shall be suspended" cannot mean forfeiture. On the question of renewal and forfeiture, see *Whitehorn v. Canadian Guardian Life Insurance Co.* (1909), 19 O.L.R. 535, at p. 539. The company's lax conduct in June, in connection with the note, operated as a waiver.

Watson, in reply, argued that the giving of a note was not payment, and referred to *Pense v. Northern Life Assurance Co.*, 15 O.L.R. at p. 133. He also referred to the evidence and the provisions of the policy, on the question of waiver.

March 22. RIDDELL, J.:—This is an appeal by the insurance company from the judgment of Mr. Justice Britton. The facts are stated in the learned Judge's reasons for judgment, 33 O.L.R. 68.

The first matter for consideration is the meaning of the expression "cash surrender value" in clause 9; and, in order that that clause may be fully investigated, I here copy from the policy the clauses which should be borne in mind. The clauses I take from the original policy, not from the alleged copies furnished for the use of the Court. These are not copies, and the labour of examining the original has been thrown upon us:—

7. Cash loans. At the end of the third and any subsequent year, provided all premiums have been paid as required, in the absence of statutory or other restrictions, the company will grant to the person or persons entitled, a loan for the amount

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shewn in the following table, deducting therefrom all previous loans (if any) and interest thereon, together with any other indebtedness to the company.

9. Non-forfeiture. If, at any time of default in payment of any premium on this policy after it has been in force for three years, the cash surrender value (less any indebtedness) shall exceed the amount of such premium (whether yearly, half-yearly or quarterly), this policy shall not lapse, but shall continue in force for the time covered by the said premium. At the end of the said term or succeeding terms, upon the maturity and default of subsequent premiums, if the cash surrender value (less any indebtedness) is sufficient to pay the premium then due, or a premium for a period of not less than three months, this policy shall be continued in force until the end of such period, when, however, it will lapse and the company's liability cease, unless the succeeding premium be paid in cash within the thirty days' grace. All premiums in default, with interest at six per cent. compounded yearly, shall be a first lien and charge against the policy.

10. Surrender values. At the end of the third and any subsequent year during which full premiums have been paid, or within thirty days thereafter, on the surrender and discharge of the policy, provided there be no indebtedness to the company, the surrender value in cash or non-participating paid-up assurance, as shewn in the following table, shall become available to the assured or legal beneficiary. If there be any indebtedness to the company, it shall be deducted from the cash surrender value; or, if paid-up assurance be applied for, it shall be for a sum reduced in the like proportion.

GUARANTEED LOAN AND SURRENDER VALUES.

End of Year.	Cash Surrender Value.	Cash Loans See Condition No. 7	Paid-up Assurance.
3	\$ 68	\$ 62	\$ 300
4	94	84	400
5	122	110	500
6	150	134	600
7	182	164	700

End of Year.	Cash Surrender Value.	Cash Loans See Condition No. 7	Paid-up Assurance.	App. Div. 1915
8	214	192	800	—
9	248	224	900	DEVITT
10	284	256	1000	v.
11	330	296	1100	MUTUAL
12	376	338	1200	LIFE
13	440	396	1300	INSURANCE
14	510	458	1400	CO. OF
15	586	528	1500	CANADA.
16	638	574	1600	—
17	690	620	1700	Riddell, J.
18	744	670	1800	
19	802	722	1900	
20	958	862	Paid-up	

It is admitted that if "cash surrender value" means the same thing in clause 9 as in the table, the plaintiff's case must fail on this point.

"Surrender value" is a well-recognised expression in life assurance. It means the amount of money or its equivalent which the company could afford to pay to be rid of the existing policy. Actuarially, it is a function direct of the amount of the policy, inverse of the probability of life and the amount of the premium. (Of course the amount of the premium is itself in practice a function direct of the amount of the policy and inverse of the probability of life; but there is no necessary fixed relation, and every company decides the amount for itself). So far the amount is capable of calculation within reasonably narrow limits.

But there are other elements which must be considered by an assurance company. As a matter of business the proposition must be made attractive. The company which offers the largest "surrender value" will, *cæteris paribus*, get the largest business; but at the same time surrenders are to be discouraged—every surrender reduces the amount of outstanding insurance, and the advertisement becomes the less alluring. It is human nature to follow the crowd, and the "largest company" is apt to get the most insurance. An assured liberally dealt with on

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surrender is likely to be a friend; one dealt with in a penurious spirit is a potential enemy. Many such considerations the wise insurance man must bear in mind. The effect has not been tabulated and cannot be tabulated without an enormous number of observations, if at all. Any one with a fair knowledge of the theory of probabilities and practised in mathematical calculation could readily, with available tables of mortality, etc., figure out the theoretical "surrender values," but the psychological element is obscure, and every company may differ from every other in its estimate of its significance. Accordingly, every company must be permitted to determine its own "surrender value;" this may or may not agree with that of any other company.

Notwithstanding Mr. Robertson's very clear and cogent argument, I think this company has fixed the surrender value of this policy for all purposes. The policy has a table giving the "cash surrender value" at the end of each year, and it would require very strong considerations to authorise us to hold that when the same words are used in clause 9 they mean something else. No such considerations exist. The argument based upon clause 10 does not, I think, lead to the conclusion desiderated by the plaintiff.

In the first place, while in one part of the clause the words are not the same, being "surrender value in cash" instead of "cash surrender value," the difference is trifling and the meaning identical. There is nothing to shew that any difference of meaning was intended. Again, the very expression "cash surrender value" is used in the latter part of the clause, clearly synonymous with "surrender value in cash" in the earlier part.

But it is said that the table was only for the purposes of clauses 10 and 7. I do not find anything which so indicates; and the fact that the "surrender value in cash" is "available to the assured or legal beneficiary" only "at the end of the third or any subsequent year during which full premiums have been paid or within thirty days thereafter," does not assist the contention now under consideration.

"Available" does not mean "existing." It means "in such a condition as that it can be taken advantage of." In *Brett v.*

Monarch Investment Building Society, [1894] 1 Q.B. 367, the balance existed in fact, although it was not available. In *Birchall v. Bullough*, [1896] 1 Q.B. 325, the unstamped bill existed and was made use of to refresh a witness's memory, although the statute said that it should not be "available for any purpose whatever;" but it could not be used itself, *i.e.*, could not be taken advantage of to prove the receipt of money: *Ashling v. Boon*, [1891] 1 Ch. 568. The profits existed in fact and would help to make a future dividend, although they were not "available for dividend" in *In re Crichton's Oil Co.*, [1902] 2 Ch. 86.

Remembering that the company must be the sole judge of surrender value, it is perfectly justified in making that surrender value arbitrarily increase at any particular time and at any interval. It may cause it to increase day by day, month by month, year by year, quinquennially, decennially. I think the company here has fixed the surrender value for the purposes of this policy, increasing at the end of each year (after the third). The surrender value so fixed at the end of any one year continues to be the surrender value until it is increased. The assured cannot always avail himself of it. It is not "available" to him if he allow the thirty days to elapse, but it exists nevertheless and exists at the amount fixed by the company. If during the thirty days the assured desires cash, he has a right to demand and to receive it; if he lets that period go by, he cannot—it is no longer available to him so that he can realise on it without the consent of the company. If he applies at any other time, the company may refuse, and the matter will become one of contract *ultra* the policy.

On the facts of this case, I do not think that the plaintiff can succeed under the terms of clause 9 of the policy. (It is to be remarked that in the copies furnished to the Court this is headed "Automatic Non-Forfeiture;" the word "Automatic" does not appear in the original, and any argument based upon it falls to the ground).

Then the defendants rely upon clause 3, and upon the clause at the bottom of page 2 (page 3 in the copies furnished to the Court). Clause 3 in the policy reads thus: "3. Termination and revival. If any premium or written obligation given there-

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for be not paid when due (except as provided in the clause respecting non-forfeiture hereinafter contained), or if the interest on any loan secured by this policy remain in default until such loan and the accrued interest thereon capitalised annually amount to its cash surrender value, the policy shall be void and all liability of the company thereon shall cease; but it may be revived by the company within twelve months from the date of lapse, on satisfactory evidence being furnished of the good health and habits of the assured and on payment of arrears.”

(In the copies, so called, furnished to the Court, the claim is somewhat different *ad fin.*; but the difference is not of consequence here.)

The added clause reads (so far as material): “And I further agree . . . that the principles and methods which may be adopted by the company for the determination and apportionment to such policy, of any surplus or profits, shall be and are hereby ratified and accepted by and for every person who shall have any claim under such policy . . . and I further agree that if a promissory note or other written obligation be given for any premium or part thereof, and be not paid at maturity, the assurance granted and policy issued on the application shall not be in force, and the operation thereof shall be suspended while such default in payment continues, but I am nevertheless to be liable upon such obligation to the full amount unpaid thereon; and upon payment as aforesaid during my life and good health, and before the lapse of the policy by efflux of time, the policy shall against acquire force.”

It is contended for the plaintiff that the latter clause is not pleaded; and strictly that is so. But the plaintiff sets up the policy and sues on it; and the Supreme Court of Canada in *Lake Erie and Detroit River R.W. Co. v. Sales* (1896), 26 S.C.R. 663, decided that, where the plaintiff's claim is explicitly on a contract, all the terms of the contract may be taken advantage of by the defendant without special plea. See p. 677. There is no change in the rules of pleading affecting this question since that decision; and I think the objection not well taken.

But, even if such a plea should have been specifically set out, the defendants should be allowed so to plead; and, in case

the matter is to go further, they would be wise to amend their defence accordingly. Since the Judicature Act, defendants have been held to their pleadings generally in two cases only: first, when the other side would be taken by surprise; and, second, when the defendant was considered to have declined to avail himself of a defence which would amount to a valid and sufficient answer to the demand and waived his right to insist upon that defence. *Quilibet potest renunciare juri pro se introducto*. Here the facts relied upon are specially pleaded, and it cannot be suggested that the plaintiff is taken by surprise or that he could better his case by evidence; and it is plain from the pleading in other respects that the defendants never intended to waive any defence based upon the added clause.

The real defence on the point is, that a note for \$15.25, made by the assured, dated the 7th July, 1913, at three months after date, was not paid at maturity. This note, the defendants say, was given for part of a premium; and its non-payment at maturity, the defendants claim, furnishes a complete bar to the plaintiff's demand.

That the note was made by the assured and that it was not paid at maturity, is admitted; and, if the defendants can make it come within the words in the added clause "given for . . . any part" of "any premium," I think they should succeed.

All the material facts appear from the documents. A premium becoming due on the 28th March, 1913, the assured writes on the 16th April, 1913 (exhibit 4), with a money-order for \$25 as part payment of the premium, and asks the company to send him "a note for sixty days for the balance," which he agrees to sign and return. A note (exhibit 5) for \$30.50, at two months, is sent him; this he signs at Vancouver on the 24th April, and returns to the company. Clearly this note was given for part of the premium; it was sent to the assured in answer to a request from him to send him a note "for the balance" of his premium then due. When this note was not paid at maturity, the company, I have no doubt, could have declared that the policy "shall not be in force;" and, if the assured had died without change of circumstances, the policy would not have been payable.

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But there was a change. The assured by letter (exhibit 6) of the 30th June, 1913, asks, "Will you kindly renew my note for \$30, due June 24th, for two months." The company decline, but say (exhibit 7), they "will accept an extension note when one-half and interest is paid; therefore if you forward to us \$15.55 we could extend the balance for you for a period of three months. Enclosed herewith you will find a note on the company's form which you could complete for \$15.25 and return to us together with an order for \$15.55. This will keep your insurance in full force. Kindly let us hear from you by return mail so that your assurance will not lapse. . . ." The note was signed and returned with the money-order to the company, who write acknowledging receipt of "your favour enclosing money-order for \$15.55, covering one-half of your note which fell due on the 24th June, and a note for the remainder. You will herewith . . . find enclosed the old note." This note for \$15.25 it was which was never paid, and the non-payment of which is claimed by the defendants as furnishing an answer to the plaintiff's claim.

The mere receipt of the money-order and a note to satisfy the remainder of the April note would not be of consequence as a waiver of the right to declare the policy not in force; the added clause specifically provides for the liability of the maker continuing although the policy is no longer in force. But the statement that the money-order and the note would keep the insurance in full force is conclusive of waiver, and indeed the defendants do not contend to the contrary.

It seems to me that the real state of affairs is this. The company had the right in June to declare the policy at an end (at least *sub modo*); for their own purposes, laudable enough no doubt, they prefer to make a new bargain with the assured quite outside of the policy: "You pay to us \$15.25, and 'this will keep your insurance in full force.' " The assured agrees, pays his money and sends his note; and I cannot see why this is not a perfectly good contract on the part of the company to keep the "insurance in full force." But the contract can scarcely be read as keeping the policy in full force other than on its terms. And it does really nothing more than specifi-

cally to agree to what the law would enforce without specific agreement. The plaintiff does not seem to be advanced by this agreement beyond what the defendants concede.

Were it not for authority binding upon us, I should be inclined to hold that the April note was paid, and the new note was not one which came within the added clause.

The mere taking of a new note for the amount of a former is not in itself payment of the old one: Falconbridge on Banking and Bills of Exchange, p. 577; Maclaren on Bills of Exchange, 3rd ed., p. 320; if the holder retains the original, the presumption is that it is to continue to exist: *Ex p. Barclay* (1802), 7 Ves. Jr. 596. As is said by a very eminent Lower Canadian Judge (I translate): "If B. (the maker) intended to make a novation, he should have required G. and F. (the payees) to send him the first note:" *per* Stuart, J., in *Noad v. Bouchard* (1860), 10 L.C.R. 476, at p. 477. Here the note was given up, and, no doubt, destroyed. The company have never claimed that it continued in existence as a security after their sending it to the assured; they do not set it up in their pleadings or base any defence on its non-payment.

The delivery up of the former note has often, if not universally, been considered strong evidence of novation: Parsons on Notes and Bills, 2nd ed., vol. 2, p. 203; Daniel on Negotiable Instruments, 6th ed., paras. 1266, 1266a; and where, as in this case, the new note is given for a smaller amount, the conclusion is well-nigh irresistible: 7 Cyc. 1012, para. b.

Everything here points to an intention to consider the new note and the money-order as payment of the note of April.

The new note then was not precisely a "written obligation given" for "any premium," and so does not come precisely under the terms of clause 3. Nor, as I should have thought, is it "a promissory note or other written obligation . . . given for any premium or part thereof" under the added clause. It was given in part payment not of any premium but of a note, itself given in part payment of a premium. We should interpret a policy of insurance with reasonable strictness against the company which puts it forward and whose language it contains

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—more especially when forfeiture is claimed as the result of another interpretation. But it would seem that authority binds us to hold the contrary.

McGeachie v. North American Life Assurance Co., 23 S.C.R. 148 (S.C., 22 O.R. 151, 20 A.R. 187), is mainly relied on. In that case, in the insurance policy there were two clauses: (1) a clause like that in the present case: "if a note . . . be given for the first or a subsequent premium or any part thereof, and if the same be not paid at maturity, it is agreed that any insurance or policy made on this application shall thereupon become null and void, but the note . . . must nevertheless be paid" (22 O.R. at p. 155); and (2) "if any premium note, cheque, or other obligation given on account of a premium, be not paid when due, this policy shall be void, and all payments made upon it shall be forfeited to the company" (22 O.R. at p. 158). The first note, \$31.10, was renewed with interest by a renewal note, and that with interest by another. The assured sent, before maturity, a payment of \$10, and gave a new note for the balance, which, when due, was renewed for one month, the old note being cancelled and returned to the maker. The last note not being paid, the company demanded payment by a letter which reached the post office of the assured the day he died, and he never received it. Payment was tendered by his representatives and refused; and action was brought. Street, J., held that the last note was given for a part of the first premium, and dismissed the action on the strength of the condition (1) above. This was reversed by the Divisional Court, Armour, C.J., and Falconbridge, J. (now Chief Justice). The right to declare the policy void on the default in payment of the first note was admitted, but the conduct of the company in taking renewals and demanding payment was considered a waiver of the forfeiture. In the Court of Appeal, Hagarty, C.J.O., and Burton, J.A. (afterwards Chief Justice), do not mention the clause upon which they base their judgment. Since the only clause justifying the company in demanding the payment of the note is the former of the two above set out, and both these learned Judges consider the fact that the company did demand payment no waiver under the circumstances, it is fairly clear

that they must have been considering that former clause. Mr. Justice Osler speaks of the latter clause only, but (20 A.R. at p. 194) he says, "the . . . default in payment of the obligation given for the premium, and a call for its payment, which never came to the knowledge of the insured"—clearly indicating that, in his opinion, the last note was "given for the premium." Mr. Justice Maclellan, while he thought that "the second and subsequent notes were not given on account of a premium, as the first was, but in payment of the antecedent ones . . .," upon reflection, thought "it would be putting too narrow a construction upon the language of the condition to hold that the subsequent notes were not also given on account of a premium." And at p. 197 he says: "By the terms of the contract he" (*i.e.*, the company's agent) "could demand payment of the note whether the policy was void or not." By the terms of only the first mentioned clause, and not those of the latter, could the agent demand payment of the note, and it must be taken that the learned Judge considered that the last note was given, not only "on account of" the premium, but for a premium or some part thereof. Accordingly, the Court of Appeal must have considered, in a case on all fours with the present, that the note given to make up the balance of a note given for a premium, after crediting a cash payment, was itself given for part of a premium. It is true that in the Supreme Court a different terminology was under consideration (23 S.C.R. at p. 150), and the company relied upon the latter condition. But we are bound by the judgment of the Court of Appeal; and, if any distinction is to be drawn, it should be by a higher Court.

The policy was therefore not "in force" at the time of the death of the assured, and the plaintiff cannot succeed.

The appeal should be allowed and the action dismissed with costs. As to costs of the appeal, in the case of *Re Stinson and College of Physicians and Surgeons of Ontario* (1912), 27 O.L.R. 565, a Divisional Court refused all costs (but one counsel fee) to a successful appellant when the material furnished was incomplete; such a course is *â fortiori* when the material furnished is incorrect. I think the same order should be made in this case.

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We were informed that what the defendants want is a judgment on principle, and not so much to prevent the payment of the policy; probably they, having such a judgment, will now pay the policy. The circumstances of the case are very peculiar; and payment, under such circumstances, would probably not be set up as a precedent.

FALCONBRIDGE, C.J.K.B.:—I agree.

LATCHFORD, J.:—Two questions were raised upon this appeal. For the appellants it was argued that the promissory note for \$15.25 falling due on the 10th October, 1913, and not paid, was within the provision rendering the policy void "if any premium or written obligation therefor be not paid when due (except as provided in the clause respecting non-forfeiture hereinafter contained)." The note was in fact in part renewal of a promissory note for \$30.50, which, with \$25 in cash, had been given in payment of the annual premium of \$55.50 due on the 1st April, 1913. If the policy was not void by reason of the non-payment of the note for \$15.50, the plaintiff is entitled to recover.

On the part of the plaintiff it is contended that, even though the note for \$15.50 is considered as given "for" the premium, the provision as to non-forfeiture prevented the policy from becoming void.

In *McGeachie v. North American Life Assurance Co.*, the application provided that the policy should be void if a note or other obligation given "for" the first or a subsequent premium was not paid at maturity. In the policy itself was a condition that if any premium note . . . given "on account of" a premium was not paid when due the policy should be void. At the trial before Street, J., the question appears not to have been so much whether a second and subsequent notes were given "for" or "on account of" the premium, as the first note was given; but whether the defendants had waived their right to consider the policy void. On appeal to a Divisional Court the policy was treated as voidable only at the election of the insurers, and it was held that they had by their conduct elected

to continue the policy in force: judgment of Armour, C.J., 22 O.R. 151, at p. 163. In the Court of Appeal, 20 A.R. 187, the judgment of the Divisional Court was reversed and that of Street, J., at the trial, restored, on the ground that the insurers were not bound, on non-payment of the note, to do any act to determine the risk. The policy became void upon non-fulfilment of the condition, and no act on the part of the company was necessary to shew that the company had elected to avail itself of the forfeiture. Macleennan, J.A., in dealing with the question whether the unpaid note was given "on account of a premium"—a point which he thought might make a difference—said (p. 195): "The second and subsequent notes were not given on account of the premium, as the first was, but in payment of the antecedent ones, or at least in lieu of them. Upon reflection, however, I think it would be putting too narrow a construction upon the language of the condition to hold that the subsequent notes were not also given on account of a premium. We cannot truthfully, making a fair and reasonable use of language, say that they were not given on account of a premium. It is evident that all the notes were given for that and nothing else."

The language of the contract in the present case is slightly different, in that the word "therefor" is used instead of "for" and "on account of" in regard to a written obligation given for a premium. But it would, I think, be an unreasonable refinement to say that the note for \$15.50 was not given "for" the premium that was unpaid. It was not given for anything else.

There remains the question as to the operation of the clause regarding non-forfeiture.

If the words "cash surrender value," in the clause of the policy providing against forfeiture, mean, as the learned trial Judge considered, a cash surrender value ascertainable actuarially at the date default occurred in the payment of the note for \$15.50, the policy was in force at the death of the assured, and the plaintiff is entitled to recover. If, on the other hand, the words mean, as the defendants contend, the cash sur-

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render value stated in the table of surrender and loan values, which became available to the assured at the end of the third year—the 1st April, 1913—the action must fail.

It is to default in the payment of a premium, and not of a note or other obligation given for a premium, that the non-forfeiture clause applies. The time of such default depends on whether the premium is payable “yearly, half-yearly, or quarterly.” It was at “the end of said term”—in this case, at the end of the yearly term, the 1st April, 1913—that upon maturity and default the non-forfeiture clause become operative. The policy was to be continued to the end of the “term” or “period” thus begun, when it was to lapse and the company’s liability to cease, unless the premium for the succeeding term or period (in this case one year) was paid within the thirty days of grace.

Effect cannot, in my opinion, be given to the non-forfeiture clause, unless regard is had to the table which fixes the cash surrender and loan values as of the end of each term. It is only at the end of such terms that the premiums became due, and only at such times and not at any intermediate time that the non-forfeiture clause operated to save the rights of the assured.

I therefore think the appeal must be allowed with costs.

KELLY, J.:—The first question to be determined is, what is the meaning of “cash surrender value” used in the “privileges and conditions” which form part of the contract of insurance on which the action is brought? The learned trial Judge treated the matter as if cash surrender value accrued from day to day; he says, “the defendants have fixed it as a growing amount *de die in diem*.” If that is the correct view, the cash surrender value on the 10th October, 1913, the date of maturity of the \$15.25 promissory note representing the balance of premium due on the 1st April, 1913, would not be \$68—the sum stated in the table as of the end of the third year of the term of the policy— but that sum, plus an additional sum accrued to the 10th October, on a consideration of the sums named in the table as of the end of the third and fourth years respectively.

But is that the correct principle on which to determine cash surrender value at any given time? The policy does not say so; it fixes \$68 as the amount at the end of the third year, and is silent as to any increase until the end of the fourth year is reached, when an increase over that at the end of the preceding year is distinctly made. Cash surrender value is fixed by the company, and their determination of it is specifically embodied in the contract of insurance. The policy contains not a word from which the conclusion may be drawn that the increase in the amount of cash surrender value should be otherwise than at the end of each of the specified years. If the company had intended that the assured should have the benefit of an accrual from day to day, or that before the end of the current year the cash surrender value was to be other than that expressly fixed as of the end of the preceding year, apt language to that effect, in a contract no doubt deliberately and most carefully drawn, would have been employed.

The wording of the policy is the language of the company itself, and must be taken most strongly against it. This is the view expressed by Lord St. Leonards in *Anderson v. Fitzgerald* (1853), 4 H.L.C. 484, where he says (at p. 507): "It" (the policy) "is of course prepared by the company, and if therefore there should be any ambiguity in it, must be taken, according to law, more strongly against the person who prepared it." Reading the policy even in the light of this decision, I cannot give to it the effect claimed for it by respondent. I know of no authority giving it that effect.

The other chief ground of defence is, that the \$15.25 promissory note was given for part payment of the premium which fell due on the 1st April, 1913, and, not having been paid at maturity, the assurance ceased to be in force. This contention is based on the term of the policy that "if a promissory note or other written obligation be given for any premium or part thereof, and be not paid at maturity, the assurance granted and policy issued on the application shall not be in force, and the operation thereof shall be suspended while such default in payment continues, but I am, nevertheless, to be liable upon

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such obligation to the full amount unpaid thereon; and upon payment as aforesaid during my life and good health and before the lapse of the policy by efflux of time, the policy shall again acquire force." The respondent is at issue with the appellants on the effect of the note being overdue, and argues that it cannot be considered as a note given for premium or part of premium, but in satisfaction of the balance unpaid on the note of \$30.50, which was given for part of the premium due on the 1st April, 1913.

The question thus raised came squarely before the Supreme Court of Canada in *McGeachie v. North American Life Assurance Co.*, 23 S.C.R. 148, an action on a policy which contained a condition that if any premium, or note, etc., given therefor, was not paid when due, the policy should be void; it was held that where a note given for a premium was partly paid when due and renewed, and the renewal was overdue and unpaid at the death of the assured, the policy was void. That authority is binding here.

The cash surrender value, as defined above (less the loan indebtedness admittedly due by the assured), did not exceed—it did not equal—the amount of the overdue premium, and the policy was not kept in force by virtue of the non-forfeiture clause. That circumstance is fatal to the respondent's position.

I am unable to hold that what took place after the maturity of the note was a waiver of the breach of the condition so as to keep the policy alive.

The appeal, in my opinion, should be allowed with costs.

Appeal allowed.

[APPELLATE DIVISION.]

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March 23.

CROWLEY V. BOVING AND CO. OF CANADA.

Evidence—Motion before Divisional Court of Appellate Division—Examination of Witnesses—Leave of Court—Necessity for—Appointment.

Where a party making a motion to a Divisional Court of the Appellate Division proposes to read at the hearing of the motion the depositions of certain witnesses to be taken, he must obtain leave from the Divisional Court to examine the witnesses; an appointment issued without leave for their examination is irregular and will be set aside.

Trethewey v. Trethewey (1907), 10 O.W.R. 893, approved and followed.

ACTION brought by Charles Crowley to recover damages for injuries sustained by him while working for the defendants. The action was tried before MEREDITH, C.J.C.P., and a jury; and, upon the findings of the jury, the action was dismissed.

The plaintiff appealed; his appeal was heard by a Divisional Court of the Appellate Division on the 11th February, 1915, and was dismissed.

On the 16th February, 1915, the plaintiff served notice of a motion to re-open the hearing of the appeal and for a new trial, upon the ground that he had discovered since the trial and since the hearing of the appeal that the testimony given by a certain witness at the trial did not relate to the place where the plaintiff was when he was injured, but to another place, and that the plaintiff was taken by surprise at the trial, and upon other grounds.

In support of this motion the plaintiff proposed to examine three witnesses, with the view of reading their depositions at the hearing of the motion, and obtained from a local officer an appointment for the examination of the three witnesses.

Upon the application of the defendants, the appointment was set aside by an order of the Local Master at Lindsay.

The plaintiff appealed from the order of the Local Master; the appeal came on for hearing in Chambers on the 12th March, 1915, before BOYD, C., who adjourned it for hearing by the Divisional Court of the Appellate Division which should hear the motion to re-open the appeal and for a new trial.

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March 23. The appeal and the main motion were heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

W. Laidlaw, K.C., for the appellant, referred to Rules 523 and 232. Under Rule 523 no leave was required. If necessary, he would ask the Court now to give leave to examine the witnesses.

C. A. Moss, for the defendants, the respondents, suggested that the proposed proceeding was dangerous, and that this Court was *functus officio*. He referred to Rules 510 *et seq.*, and to Holmested's Judicature Act, 4th ed., p. 1139.

THE COURT held, approving *Trethewey v. Trethewey* (1907), 10 O.W.R. 893, that the appointment was improperly issued, no leave having been obtained from the appellate Court.

The appeal from the order of the Local Master was, therefore, dismissed; and the substantive application to the Court for leave was refused; the main motion, to re-open the hearing and for a new trial, was also refused.

Costs were awarded to the defendants throughout.

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[MEREDITH, C.J.C.P.]

March 23.

RE FEARNLEY'S ASSIGNMENT.

Assignments and Preferences—Assignment for Benefit of Creditors under Assignments and Preferences Act—Summary Application by Assignee for Determination of Conflicting Claims to Rank on Estate—Jurisdiction—Trustee Act, sec. 66—Rule 600—Contest between Creditor and Surety.

An assignee for the benefit of creditors, under an assignment which comes within the provisions of the Assignments and Preferences Act, R.S.O. 1914, ch. 134, is not entitled, upon a summary application to the Court, under sec. 66 of the Trustee Act, R.S.O. 1914, ch. 121, or under Rule 600, to have conflicting claims of right to rank upon the estate determined.

When special provisions are enacted for dealing with particular cases, these provisions are to govern, even though there may be some general provisions of another enactment wide enough to cover some of them; and the Assignments and Preferences Act contains special provisions applicable for the determination of all questions respecting distribution of an assigned estate.

The contest being between creditor and surety as to the right to rank upon the debtor's estate—*semble*, that, if the surety were surety for the whole debt, he could not rank in competition with the creditors until

the whole debt was paid; but, if the surety was answerable for part of the debt only—under no obligation as to any other part—on payment of that part, he, and not the creditor, would be entitled to rank in respect of it.

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MOTION by an assignee for the benefit of creditors for an order determining conflicting claims to rank upon the estate of the assignor in the hands of the applicant.

March 19. The motion was heard by MEREDITH, C.J.C.P., in the Weekly Court at Toronto.

G. M. Willoughby, for the applicant.

W. H. Barnum, for F. J. Fearnley, a surety.

Both counsel relied on *Martin v. McMullen* (1891), 18 A.R. 559, and cases there discussed.

March 23. MEREDITH, C.J.C.P.:—The applicant is an assignee for the benefit of creditors, under an assignment which comes within the provisions of the Assignments and Preferences Act, R.S.O. 1914, ch. 134: and the purpose of the application is to have conflicting claims of right to rank upon the estate determined, upon a summary application in the Weekly Court.

It is said that the application is based upon the provisions of the Trustee Act, R.S.O. 1914, ch. 121—sec. 66,* I suppose: and it is shewn that an application of the same character was recently made and given effect, under the provisions of Rule 600†: but not without an expression of doubt as to the applicabil-

*66.—(1) A trustee, guardian or personal representative may, without the institution of an action, apply to the Supreme Court in the manner prescribed by Rules of Court, for the opinion, advice or direction of the Court on any question respecting the management or administration of the trust property or the assets of his ward or his testator or intestate.

†600. The executors or administrators of a deceased person or any of them, and the trustees under any deed or instrument or any of them, or any person claiming to be interested in the relief sought as creditor, devisee, legatee, next of kin or heir at law of a deceased person, or as *cestui que trust* under the trusts of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may apply by originating notice for the determination, without an administration of the estate or trust, of any of the following questions or matters:

(a) Any question affecting the rights or interests of the person

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ity of the Rule to such a case—a doubt which, I have no doubt, was well-founded.‡

The novelty of such an application in itself raises a strong suspicion that it is misconceived: as I had and have no doubt it is.

In the first place, the contest is over the right to a dividend which has already been paid to one of the contestants. No opinion, advice, or direction that could be given upon this application, if there were power to give any, could recall the money. It is too late to throw the grass of advice or opinion at those who have the money; if anything is to be done, the time has come for throwing the stone of a writ issued out of the proper Court having jurisdiction to deal with the amount involved. The creditors who have the money have not in any way submitted their rights for consideration upon this application; they have altogether ignored it, as they had a right to do.

But it is said that there may be another dividend; and so it may be that the questions which perplex the assignee may become practical; and the opinion, advice, or direction sought really needed: and, that being so, it is necessary to consider the question whether the invocation of the Trustee Act or of Rule 600, in such a case as this, is in any way warranted; and I am yet unable to perceive how it can be.

Special comprehensive provisions are contained in the Assignments and Preferences Act for the winding-up of the assigned estate through the assignee, the assignor, the creditors and “inspectors” representing them, and the County Court Judge. Under sec. 34 of the Act, by which secs. 33 and 34 of the Creditors Relief Act are made applicable, all questions respecting distribution are provided for, in addition to such other

claiming to be creditor, devisee, legatee, next of kin or heir at law, or *cestui que trust*.

(g) The opinion, advice or direction of a Judge pursuant to the Trustee Act.

(h) The determination of any question arising in the administration of the estate or trust.

‡See *Re Battrim* (1915), 7 O.W.N. 778.

provisions on the subject as the Assignments and Preferences Act contains.

When special provisions are enacted for dealing with particular cases, those provisions are to govern, even though there may be some general provisions of another enactment that might be deemed wide enough to cover some of them.

Beside this, I cannot think the Trustee Act wide enough to cover this case; nor can I see how Rule 600 can be.

Section 26(4) of the Assignments and Preferences Act provides that nothing in the two next preceding sub-sections shall interfere with the protection afforded to assignees by sec. 56 of the Trustee Act; and the protection afforded by that section is not to trustees merely, as it should be if the word "trustee" included "assignee for the benefit of creditors," but is to "trustee, assignee or personal representative." One section, and one section only, of the Trustee Act, is made applicable to assignees such as the applicant. I hold that the provisions invoked of the Trustee Act are not applicable to this case. In regard to Rule 600, it carries forward only that which was for very many years, to some extent, the practice of the Court of Chancery, applicable to the cases to which it is commonly applied; and is, as the words "without an administration of the estate or trust" shew, applicable only to cases that would be determinable properly in such an administration. Insolvent or bankrupt estates are not so administered.

However, at the urgent request of the parties who did appear upon this application, for some expression of opinion respecting the difficulties in which they think they are involved, it may not be amiss to add, but, of course, only as *amicus consultoris*:—

That it could hardly be possible to express any opinion upon facts so vaguely set out as they are upon this application. Both sides should be heard, and that can be only in proceedings which will compel the attendance of each; or else one side only heard after notice to the other in proceedings in a Court where there is the right to adjudicate in the absence of him who does not attend. An action by the surety, or the assignee, or both, may

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be found to be the only way of recovering part of the dividend paid, if it be recoverable.

The law upon the subject of a contest between creditor and surety as to right to rank upon the debtor's estate is simple and not unreasonable. If the surety be surety for the whole debt, he cannot rank in competition with the creditors until the whole debt is paid: why should he? His obligation is to pay the whole debt; how can he be permitted not only to fail to do this but to prevent, for his own gain, the creditor obtaining full payment from the debtor? But where the surety is answerable for part of a debt only—under no obligation as to any other part—on payment of that part, he, and not the creditor, is entitled to rank in respect of it. That debt is wholly paid to the creditor; he has no further claim on any one for it. The debt becomes the debt of the debtor to the surety, and he alone can prove it, rightly. The only difficulty that has arisen is one regarding a case in which, although the surety is surety for the whole debt, his liability is limited to a certain amount only; in that case the surety cannot rank in competition with the creditor: why should he? The arrangement is that the whole debt is to be paid, but that the creditor is to look to his other rights for recovery of any sum due to him in excess of the surety's limit of liability. What right then should the surety have to prevent, for his own benefit, the creditor's full resort to his other rights until he is fully paid? The principle is logical and right; the difficulty is in saying whether any one, who has limited his liability, has also agreed that the whole debt shall be first paid: or, put as it ordinarily is, in terms which to some may seem inconsistent, whether the surety has guaranteed the whole debt, but limited the maximum amount of his liability.

If one has done no more than give an accommodation note for a certain sum for the benefit of the creditor, it may be very difficult to shew how he has guaranteed any greater debt: but that the parties must fight out, if they cannot otherwise settle it, or have it settled, without litigation.

No order is made upon this application.

[IN CHAMBERS.]

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March 23.

RE MASONIC TEMPLE CO. AND CITY OF TORONTO.

Municipal Corporations—Regulation of Buildings on Residential Streets of City—Municipal Act, R.S.O. 1914, ch. 192, sec. 406 (10)—Municipal By-law—Prescribed Distance from Line of Street—Steps Projecting from Front Wall of Building beyond Defined Line.

A by-law of a city corporation, authorised by sec. 406, sub-sec. 10, of the Municipal Act, R.S.O. 1914, ch. 192, prohibited the placing of a building on a residential street nearer to the street line than a certain prescribed distance:—

Held, that, where the building was well within the prescribed line, the erection of steps in front of it, and as a means of access to the front door, extending some distance from the front wall of the building and across the prescribed line—the steps not being more than four feet six inches above the ground level—was not within the prohibition of the statute and by-law.

Review of the authorities.

Paddington Corporation v. Attorney-General, [1906] A.C. 1, specially referred to.

MOTION by the company for a mandatory order requiring the city corporation to issue a permit for the erection of a building by the company upon land abutting on a city street.

March 17. The motion was heard by MIDDLETON, J., in Chambers.

G. F. Shepley, K.C., and *T. Reid*, for the applicants.

Irving S. Fairty, for the city corporation, the respondents.

MARCH 23. MIDDLETON, J.:—The only ground alleged for the refusal to issue the permit is that the building is said to be closer to the street line than is permitted by a by-law of the city passed under sec. 406, sub-sec. 10, of the Municipal Act, R.S.O. 1914, ch. 192, authorising the municipality to pass a by-law “prescribing the distance from the line of the street in front at which no building on a residential street may be erected or placed.”

The building in question, save as to the front steps, is well inside the prescribed line. In front of it, and as a means of access to the front door, it is proposed to construct steps which extend some distance from the front wall of the building and

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across the defined line. These steps, at their highest point, are four feet six inches above the ground level.

I have come to the conclusion that the construction of these steps is not the erection or placing of a building, within the by-law and the statute. In each case it is a question of fact whether what is done is within the prohibition of the statute.

Much light is thrown upon the situation by the decision in *Boyce v. Paddington Borough Council*, [1903] 1 Ch. 109, [1903] 2 Ch. 556, and, *sub nom. Paddington Corporation v. Attorney-General*, [1906] A.C. 1. There, under the Metropolitan Open Spaces Acts, a disused burial ground was directed to be kept in an open condition, free from buildings. Boyce erected buildings on abutting land, with windows overlooking the space. The local authority erected a hoarding so as to obstruct the access of light to his windows and prevent him from getting a prescriptive right over the open space. Boyce thereupon, in his zeal to assert the rights of the public, sought an injunction to restrain the erection of this hoarding as being a building within the prohibition. Buckley, J., before whom the matter first came, declared that this hoarding was not a building within the meaning of the Act, although a hoarding had been held to be a building within certain other statutes, and within certain covenants and restrictions. The Court of Appeal took the opposite view; but, on appeal being taken to the Lords, the principle suggested by Buckley, J., was adopted—Lord Halsbury stating (pp. 3 and 4): “The subject-matter to be dealt with has to be looked at in order to see what the word ‘building’ means in relation to that particular subject-matter. It is impossible to give any definite meaning to it in the loose language which is used in some cases; anything which is in the nature of a building might be within one covenant, and the same erection might not be a building with reference to another covenant . . . But now, my Lords, I have to look at the word ‘building’ here with reference to this subject-matter and what the Act of Parliament was doing. It is very obvious, I think, that what was intended to be done was to keep this disused burial ground from being used as a building ground, to keep it as a place of exercise, ventilation and recreation.”

This is quite in accordance with the case of *Child v. Douglas* (1854), Kay 560, where Sir W. Page Wood held that the erection of a wall two feet high with an iron rail on the top of it and the projection of a doorway, though built of brick, one foot beyond a prescribed limit, did not constitute a breach of a covenant not to build within a prescribed distance from the street; the question being whether the erection complained of in any degree substantially interfered with that which it was the object of the covenant in question to secure.

(The authority of this case was somewhat interfered with by what took place on appeal. See the same case (1854), 5 De G.M. & G. 739).

Hull v. London County Council, [1901] 1 K.B. 580, recognises the same principle. There it is said by Bruce, J. (p. 588): "It is quite clear that the object of the section is to preserve the width of the street and the general line of building frontage in order to obtain architectural uniformity;" and upon that principle a projection which would form no departure from the general line of the building erected, was not regarded as objectionable. This case was subsequently doubted; but in the latest case in which it is referred to, *A. and F. Pears Limited v. London County Council* (1911), 105 L.T.R. 525, Lord Alverstone, C.J., says: "If *Hull v. London County Council* is to be altered it must be altered by Act of Parliament and not altered by us."

As might be expected, the American cases are by no means uniform; but they are summarised thus in Cyc., vol. 13, p. 716: "A restriction as to a building line will be held to intend only that the wall of the building should be on the line and will not prohibit the erection of a stoop, porch, or platform along it unless they project an unreasonable distance as compared with like structures or unless they unreasonably obstruct light and air, or unless they are in violation of the intent of the prohibition."

Manners v. Johnson (1875), 1 Ch. D. 673, is of importance as shewing that the English Courts regard bay windows and similar projections as constituting a substantial interference

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with the uniform and architectural symmetry which the statute endeavours to secure; and I am at present inclined to think that any solid superstructure over the steps would fall within this case.

In the Supreme Court of the United States—*United States v. Mueller* (1885), 113, U.S. 153—it is held that steps and approaches leading up to a building may, for some purposes, be regarded as being no part of the building itself, but as merely constituting a means of ascent or way into the building.

If steps were situated some little distance from the main wall of the building, and there was a walk from these steps to the building, then it would be perfectly clear that the steps did not form part of the building, within the meaning of this by-law; and I think I am quite safe in holding that the steps here contemplated, which are entirely outside of the main wall of the building, do not in any way interfere with the object which the statute aims at securing, and are not within its purview.

The question whether the architect could justify his refusal to grant the permit by reference to the by-law in question was not argued before me.

The mandatory order sought must, therefore, be granted; and costs must follow the event.

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March 24.

[MIDDLETON, J.]

RE WILSON ESTATE.

Assignments and Preferences—Title to Land—Conveyance to Trustee for Benefit of Certain Creditors—Mortgage—Registration—Notice—Priorities—Estoppel—Rights of Assignee.

An assignee for the benefit of creditors takes no greater title to land included in the assignment than the assignor can give. Under the Assignments and Preferences Act, an assignee has certain rights as to attacking conveyances, etc., which his assignor has not; but these rights are purely statutory, and, apart from them, he stands in the same position as his assignor. The same rule applies where the assignment is not a general one, but is made for the purpose of securing certain creditors only.

Thibaudeau v. Paul (1895), 26 O.R. 385; and *Steele v. Murphy* (1841), 3 Moore P.C. 445, followed.

And it was *held*, in this case, applying these rules, that a mortgage made by direction of L., the equitable owner of land, in favour of S., had priority over a subsequent conveyance of the land to a trust company in trust for certain creditors of L., though the latter was first registered, and the trust company had no notice of the mortgage—L. being estopped from denying the validity of the mortgage, and the trust company, although it had the prior registered title, taking from L. no greater title than he in truth and in good conscience possessed.

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THE executors and trustees under the will of the late Dame Emma Wilson moved, upon originating notice, for an order determining to whom certain land contracted to be sold should be conveyed. The application coming before MIDDLETON, J., and it appearing that there were facts in dispute, he directed the trial of an issue between the contesting parties, the applicants submitting to convey in accordance with the finding upon the issue.

March 18. The issue was tried by MIDDLETON, J., without a jury, at Toronto.

N. F. Davidson, K.C., for Vera Schmidlin.

C. P. Smith, for the Imperial Trusts Company of Canada.

March 24. MIDDLETON, J.:—The contract of sale was made with one C. M. Thompson on the 19th April, 1905. The whole consideration called for has been paid. Contemporaneously with the making of the contract, a declaration of trust was signed by Thompson, declaring that he held in trust for Amelia M. Lobb and A. F. Lobb. On the 17th October, 1914, A. F. Lobb conveyed the lands in question to John Hunter Richardson. The conveyance is absolute in form, but was in reality in trust. On the 16th November, 1914, Richardson and Lobb conveyed the land to the Imperial Trusts Company of Canada, for the purpose of realising and dividing the proceeds ratably among certain named creditors of Lobb. By deed of the 8th January, 1915, Amelia Lobb conveyed her interest in the land—which by recital is stated to have been theretofore acquired by Lobb, though not conveyed to him—to the trust company. No conveyance having been made by the representatives of the Wilson estate, the title of the trust company to such conveyance appears to be clear, unless Miss Schmidlin is, by reason of the facts now to be stated, entitled to intervene.

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On the 10th June, 1913, one Robert A. Staton purported to mortgage part of the land in question to Miss Schmidlin, to secure the sum of \$600 advanced by her. This mortgage was not registered until after the conveyance to the trust company had been registered.

The circumstances under which this mortgage was given are these. Lobb, who was a practising barrister and solicitor, had been acting for Mrs. M. J. Britton, the widow of the late Dr. Britton, in connection with the affairs of his estate. He knew that she had some money on deposit to her credit in the Metropolitan Bank. He telephoned to her suggesting that this money be invested, and described to her the security as being a mortgage to be made by Staton upon property on Beech avenue which he knew. He advised the acceptance of this investment. Lobb then procured a mortgage to be executed by Staton, who had no title to the property. Staton acted in entire good faith, as he had on several occasions acted as trustee for Lobb at his request, and he assumed that this was property belonging to Lobb which had been placed in his name for convenience.

Some time after the mortgage was executed, the duplicate, unregistered, was handed over to Mrs. Britton. The mortgage was taken, at Mrs. Britton's request, in the name of her niece, Vera Schmidlin. After trouble had arisen, the duplicate mortgage so handed over to Mrs. Britton was registered. The other copy was found among the title papers and handed over to the trust company. At the time of the acceptance of the trust and the conveyance to the trust company, and until after the conveyance to it had been registered, it had no actual notice of the existence of this mortgage.

I have come to the conclusion that Miss Schmidlin has priority for her mortgage over the title of the trust company. As between herself and Lobb, who was then the equitable owner of the property, he is estopped from denying the validity of the mortgage, and the trust company, although it has the prior registered title, is a trustee for the benefit of creditors, and neither it nor the creditors can take from Lobb any greater title than he in truth and in good conscience possessed. An as-

signee for the benefit of creditors takes no greater title than the assignor can give. The assignee has certain statutory rights as to attacking conveyances, etc., which the assignor has not, but these rights are purely statutory; and, apart from such statutory rights, he stands in the same position as his assignor. See *Thibaudeau v. Paul* (1895), 26 O.R. 385. The same rule applies where the assignment is not a general assignment but an assignment for the purpose of securing certain creditors only: *Steele v. Murphy* (1841), 3 Moore P.C. 445.

The judgment will therefore declare that the trustees of the Wilson estate should convey to the trust company, subject however to a lien or charge in favour of Miss Schmidlin to secure the amount due to her under her mortgage, with interest and costs, and, subject thereto, upon the terms of the trust deed. The executors are entitled to be paid their costs, to be fixed at some reasonable sum, before delivering the conveyance. The property, I understand, is worth much more than Miss Schmidlin's claim, so that she would undoubtedly be paid; and, therefore, no provision looking to the enforcement of her claim, need be inserted in the judgment.

As the application is one for the purpose of clearing up the title, and as Staton disclaimed any interest, an appropriate provision may be inserted in the order which will now be issued, shewing that he has not and never had any interest in the land in question. No doubt he will be willing to execute a quit-claim deed. If so desired, the trust company may have a declaration that it is entitled to its costs of the litigation out of the proceeds of the lands after paying Miss Schmidlin's claim.

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[APPELLATE DIVISION.]

April 8.

DOWNS v. FISHER.

Motor Vehicles Act—"Owner"—*Liability for Negligence of Trespasser*—2 Geo. V. ch. 48, sec. 19—*Amendment by 4 Geo. V. ch. 36, sec. 3.*

The owner of an automobile placed it in a garage for repair or for some other purpose not clearly shewn, but not for demonstrating; S., the servant of the keeper of the garage, thinking the automobile was in the garage for use in demonstrating, took it out and operated it so negligently that the plaintiffs were injured, in November, 1913:—

Held, that, under sec. 19 of the Motor Vehicles Act, 2 Geo. V. ch. 48, which was the statute in force at the time of the injury, the owner was liable therefor.

Discussion of the meaning and effect of sec. 3 of the amending Act, 4 Geo. V. ch. 36, which came into effect on the 1st May, 1914.

Lowry v. Thompson (1913), 29 O.L.R. 478, *Wynne v. Dalby* (1913), 30 O.L.R. 67, and *Cillis v. Oakley* (1914), 31 O.L.R. 603, considered.

Judgment of the District Court of the District of Thunder Bay, affirmed.

APPEAL by the defendant Whalen from the judgment of the Judge of the District Court of the District of Thunder Bay in favour of the plaintiffs.

The following statement of facts is taken from the judgment of RIDDELL, J.:—

The defendant Fisher was the agent at Port Arthur for the Hudson "6" automobile, and had a garage. The defendant Whalen bought a car of that description, which got out of order, and Whalen placed it in Fisher's garage for repair, as he was in the habit of doing. Smith, the servant of Fisher, seems to have thought it was a "demonstrating car," although it was not left for any such purpose, but only for repairs. Another car broke down, and Smith, without the knowledge of Fisher or Whalen, took out the Whalen car, and was towing the disabled car into the garage, when, by his negligence, an accident happened to the plaintiffs on the 30th November, 1913.

The plaintiffs, on the 18th February, 1914, sued Fisher alone; but, on the case coming down for trial, Whalen and Smith were added as defendants, and the case was enlarged. Thereupon the plaintiffs delivered a new statement of claim, charging Whalen as the owner of the automobile, Smith as the servant of Fisher and the actual wrong-doer, and Fisher as his master. Each defended, and Whalen claimed indemnity over against

Fisher and Smith. An order was obtained that the question of indemnity should be tried at the trial of the action.

The case then came on for trial before His Honour Judge O'Leary of the District Court, in December, 1914, and that learned Judge endorsed the record thus: "12th January, 1915. There will be judgment for the plaintiff against the three defendants, W. J. Fisher, H. Smith, and John A. Whalen, for \$500 and costs, with relief over in favour of John A. Whalen against the defendants Fisher and Smith for whatever amount the defendant Whalen may be compelled to pay to either for damages or costs." Judgment was entered accordingly.

Notice of appeal was given by Fisher and Smith, but their appeal was not proceeded with and was dismissed with costs.

Notice of appeal was also given by Whalen.

March 8. The appeal of the defendant Whalen was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

W. N. Tilley, for the appellant, argued that, as the automobile was sent to the garage to be repaired and was taken out by a servant employed in the garage without authority, *Wynne v. Dalby* (1913), 30 O.L.R. 67, and *Cillis v. Oakley* (1914), 31 O.L.R. 603, must be applied and followed. *Lowry v. Thompson* (1913), 29 O.L.R. 478, must be distinguished.

C. A. Moss, for the plaintiffs, respondents, argued that this case was not governed by *Cillis v. Oakley*, which was a case of theft. There is a distinction between a case where an automobile is stolen and a case where it is in the hands of a trespasser. *Lowry v. Thompson* should be followed, for the liability is purely statutory: sec. 19 of the Motor Vehicles Act, 2 Geo. V. ch. 48, as amended by 4 Geo. V. ch. 36, sec. 3.

Tilley, in reply. The effect of the decision in *Cillis v. Oakley* is, that the owner of a motor vehicle is not responsible for the actions of a man over whom he has no control.

April 8. RIDDELL, J. (after setting out the facts as above):—The appeal was argued with great skill and care on both sides, and it now falls to be decided.

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The accident took place before the coming into force of the Act of 1914, 4 Geo. V. ch. 36, sec. 3, and must be decided upon the law as it stood before that statute.

In *Lowry v. Thompson*, 29 O.L.R. 478, it was claimed that damage had been done by the negligence of some person running the defendant's car. It was proved to a demonstration that, if this was the defendant's car, it had been taken out of his garage without his knowledge and consent. After the judgment against the defendant, he moved for a dismissal of the action. On the facts of that case—unless he was liable for the negligence of the person running the car, and for the reason that he (the defendant) was the owner of the car—he was entitled as a matter of law to a dismissal of the action. We refused to dismiss the action, thereby, as I humbly conceive, holding as a matter of law that the fact that the car had been taken from his possession without his consent was no defence. The Chief Justice said (p. 483): “On the jury's first verdict” (i.e., that the car had the same number as the defendant's), “the plaintiff was not entitled to judgment. On the second” (i.e., that the car was in fact his) “if allowed to stand, he is.” He thought a new trial should be granted. “The evidence of the defendant was entitled to due consideration, but was apparently ignored by the jury, who seem to have based their verdict solely on the fact that the number of the car in question was the same as the defendant's. That circumstance may have established a *primâ facie* case, but the defendant adduced evidence the other way which should not have been ignored. . . . It was the duty of the jury to give due consideration to the important evidence adduced on behalf of the defendant.” This was of course *nihil ad rem*, if the defendant was not to be held liable even if the car was found to be his; and the language is unambiguous and clear—“On the second, if allowed to stand, he is” entitled to judgment.

My brother Sutherland concurred in granting a new trial, which, as I have pointed out, would not be proper if such a defence as there proved were sufficient. My brother Leitch and myself made our meaning plain beyond controversy (p. 488); “Had it been proved and found by the jury that the accident in ques-

tion had been caused by a violation of the Act . . . I think that the owner of the car would not escape liability; but that has not been proved or found."

The case of *Cillis v. Oakley*, 31 O.L.R. 603, then came on before the Second Divisional Court. There the car had been placed out of commission (so to speak) by the removal of the spark-plug, but had been stolen by a person who was convicted of the theft. *Lowry v. Thompson* was not overruled, as indeed it could not be: sec. 32(1) of the Judicature Act, R.S.O. 1914, ch. 56. The Chief Justice, apparently referring (p. 609) to his statement in the *Lowry* case (that, if the car were the defendant's, the plaintiff would be entitled to judgment), says: "It is obiter as to whether the owner of a stolen car is liable for an injury caused by it when in control of the thief. That question I neither considered nor discussed, and no observation in my judgment was intended to have any bearing upon it."

This statement is wholly exact if taken as it stands. The car in the former case was not stolen nor in control of the thief; but I have already pointed out that the learned Chief Justice did discuss and of course did consider the liability of the owner of the car when the car was not in his possession, but had been taken out of it without his knowledge or consent.

Mr. Justice Sutherland says (p. 610): "When the owner of a motor, as here, has taken the very reasonable precaution of withdrawing the spark-plug, and thus rendering the machine harmless and incapable of motion, and it is stolen by a thief . . . I am unable to believe that the Legislature intended by the section to make the owner liable, or that, read in the light of the Act as a whole, it has that effect."

Mr. Justice Clute discusses the case only of a car being stolen, and thinks that the statute does not "create a liability against such owner, for the act of one over whom he had no control, and who, in order to be in a position to perpetrate the act causing the injury, had committed a crime against the owner by stealing his motor" (p. 606); and considers that *Lowry v. Thompson* does not compel us "to hold . . . that the owner of a motor is liable for damages done by the motor when in the

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hands of a thief without negligence on the part of the owner" (p. 607).

My brother Leitch and I thought it did.

The decision in *Cillis v. Oakley* does not overrule that in *Lowry v. Thompson*. Of the Judges who took part in the last named case, two (my brother Leitch and myself) thought it covered the case of a stolen car. The Chief Justice did not recant his opinion as expressed in the earlier case (that if the car were the defendant's the plaintiff should recover, but if it had only the same number as the defendant's he should not), as of course he would have done had he considered it wrong in law, but contents himself with saying that "it is obiter as to whether the owner of a stolen car is liable for an injury caused by it when in control of the thief" (p. 609). Both the other Judges confine their opinion to the case of a stolen car: "stolen by a thief" (p. 610); "one . . . who, in order to be in a position to perpetrate the act causing the injury, had committed a crime against the owner by stealing his motor" (p. 606).

Remembering that the *Thompson* car had not been "stolen by a thief," but had apparently been taken out by some one (a former chauffeur of the defendant's was violently suspected), and returned forthwith, both cases can stand; they are not at all inconsistent. It is of course our duty to follow both decisions. Certainly the former is not overruled and could not be, and the latter stands unshaken.

The result will be that the law before the Act 4 Geo. V. ch. 36, sec. 3, is not very much altered by the Act. Before the Act, an owner was liable for injury done by his car unless the person in charge of it had stolen it from the owner; now the law is the same except that the owner is not excused if the larcenous person in possession of the car is his employee.

It was urged upon us that in considering the case we should not draw fine distinctions; and I entirely agree. But it is better to draw fine distinctions than to do injustice. If the law was not as I have indicated, the Court did a very grave injustice to *Thompson* by compelling him to undergo the expense, annoyance, and risk of a new trial to determine a matter which was absolutely immaterial—or to *Cillis* in depriving him of a

righteous verdict. We must strive to prevent injustice by all legitimate means; and should be loath to hold that the Court has perpetrated injustice upon any litigant.

The language of the Chief Justice of Ontario in *Wynne v. Dalby*, 30 O.L.R. 67, was pressed upon us. There the McLaughlin company, the manufacturers of a motor car, had made a conditional sale of it to one Adams, the property remaining in the company until payment (p. 70).. Dalby was an employee of Adams, and caused damage to the plaintiff by his negligence in managing the car. The sole question in the appeal was, whether the McLaughlin company was "the owner" of the car, under 2 Geo. V. ch. 48, sec. 19 (R.S.O. 1914, ch. 207, sec. 19); and the Court held that it was not "the owner" for the purposes of the Act, although technically and legally the owner. Anything else was obiter. The Court did not, as it could not, overrule *Lowry v. Thompson*, which indeed does not seem to have been brought to its attention.

Any possible doubt as to the intention of the Legislature in the legislation of 1912 to make the owner liable, as I have indicated, is, I think, removed by the Act of 1914, 4 Geo. V. ch. 36, sec. 3, which was passed in case of the proprietor, not to impose a new burden upon him. It was passed in the view that the owner was liable for the negligence of any one in charge of his car, and was intended to except the case of the car being in the possession of a thief, unless that thief should be in the owner's employ.

If the car now is in the possession of one who has taken it not larcenously, but by way of civil trespass, the owner is clearly liable. Were that not the law before the passing of this Act, we should have the extraordinary case of a liability being imposed by a clause added to introduce an exception. There can, I think, be no doubt that the Legislature by this legislation has said that without it there would have been a liability; and the addition of the excepting clause does not and cannot impose a liability not imposed by that from which it is an exception.

To give full effect to the decisions, we must hold that, while the owner was not, before the Act, liable for the negligence of a thief, he was for that of a mere wrongdoer, a civil trespasser.

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Here there can be no pretence that there was a crime committed. To constitute larceny at the common law, the *animus furandi* must be present: Russell on Crimes and Misdemeanours, vol. 2, p. 1177. Our statute puts it (Criminal Code, sec. 347): "Stealing is the act of fraudulently and without colour of right taking," etc. No *animus furandi* is possible under the facts of this case, any more than in the case of the "joy-riding" chauffeur of Mr. Thompson; and the taking was not fraudulent—there was no "intent to steal" the motor: sec. 347 (2) of the Code.

I think, therefore, that the appeal fails and must be dismissed with costs.

FALCONBRIDGE, C.J.K.B.:—I agree in the result.

LATCHFORD, J.:—By sec. 19 of the Motor Vehicles Act, 2 Geo. V. ch. 48, in force on the 30th November, 1913, the date of the accident to the plaintiffs, the owner of a motor vehicle is declared to be responsible "for any violation of this Act." An amendment which came into force on the 1st May, 1914 (4 Geo. V. ch. 36, sec. 3), relieved the owner from liability if the vehicle at the time of the violation was in the possession of a person, not being in the employ of the owner, who had stolen it from the owner.

The car which collided with the plaintiff was owned by the appellant John Whalen, who had left it at Fisher's garage, where Smith, the driver of the car at the time of the accident, was employed. The owner's purpose in leaving his car at the garage is not very clear. Smith said the car was "kept," "at times," at the Fisher garage. He thought it was what is known as a demonstrating car, that is, one used to impress favourably a possible purchaser: evidence, p. 25. He evaded a question as to whether he had ever driven the owner, and said he did not drive him around as an employee, but admitted having been to Whalen's house and bringing the car back to the garage. He stated that he had driven Mrs. Whalen "on half a dozen occasions." Whalen did not, Smith says, know that he had the car out on the day of the accident—"he left it only for repairs."

Fisher said that he was not the owner of the garage, but "was running it." Mr. Whalen did not know that Smith had taken the car out. Fisher did not think he had the right to use the car. He had not said so upon his examination for discovery: evidence, pp. 36, 37. The second page of that examination is certified by the trial Judge to have been put in at the trial "as part of the cross-examination of the defendant W. J. Fisher." As cross-examination it is evidence, not only against Fisher himself, but against Whalen. Fisher, according to the extract so certified, was asked, "Was it (the car) in for repairs?" and answered: "No, sir. It was there in this way. There had been some work done on it; and, as he had no place to put it, he left it with us. As it was a demonstrating car, we used it. Our own car got stuck out at the Diamond, and we went to get it." "Q. Mr. Whalen knows that you used that car? A. I believe he did." Fisher was then asked (p. 37): "What do you say as regards that part of your examination for discovery? A. I don't remember anything about it. Q. Which is the correct statement, the one you make now or the one you made at the examination for discovery? A. I don't remember anything about the other one." He added, in answer to Mr. Whalen's counsel, that "there was no arrangement to use the car as a demonstrating car."

Mr. Whalen was not called as a witness, and there is no evidence other than what I have quoted as to the circumstances under which his car was kept and used in the Fisher garage. There is no finding on the point by the trial Judge. Certain inferences may, however, be deduced with reason from the evidence—meagre and unsatisfactory as that undoubtedly is. The car was kept at Fisher's for the convenience of Mr. Whalen, who had no garage at his residence. While there, it was driven by Smith from the Whalen residence to the garage on at least one occasion, and on several occasions Smith acted as chauffeur while Mrs. Whalen rode in the car. Smith was not, however, employed by Whalen or Mrs. Whalen, but by Fisher. The car, at the time of the accident, was being used by Smith upon Fisher's business without Whalen's knowledge.

I think that Mr. Whalen was rightly held liable for the

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damage caused by his car. The car, though used by Smith without the owner's knowledge, was not stolen by Smith. At most it was a wrongful taking out of the car upon his master's business.

The cases pressed upon our attention do not apply in the circumstances of this case. The statute imposes upon the owner of a car a liability for its misuse.

In the light of the distinguishing facts of the case at bar, it seems to me quite unnecessary to attempt to reconcile the cases of *Lowry v. Thompson* and *Cillis v. Oakley*. It is worthy of observation that it was while the latter case was standing for judgment (the 1st May, 1914), that the Legislature passed the statute relieving the owner of a car from liability when, and only when, at the time of the violation, the car "was in the possession of a person, not being in the employ of the owner, who had stolen it from the owner."

"Owner" is not to be understood in its strict or technical sense. It means in the statute the actual owner—the person who has the right of dominion over the car: *Wynne v. Dalby*, 31 O.L.R. 67.

Upon such persons, the Legislature, in its wisdom, has imposed an onerous responsibility. The purpose of the legislation is plain. Motor vehicles are dangerous machines in general use on streets and roads throughout the Province. They may be and often are put in rapid and destructive motion by persons not their owners, who, having nothing to lose, are indifferent or contemptuous regarding the rights of others lawfully using the same highway. In every such case unless the car has been stolen from the owner by one not an employee, the owner is made liable for the consequences resulting from the misuse of his car.

By keeping his car at the Fisher garage—whether for his own purpose or Fisher's. matters not—Mr. Whalen afforded Fisher and his employee a means of causing the damages sustained by the plaintiffs. For this the statute makes him liable.

I, therefore, think the appeal of the defendant Whalen should be dismissed with costs.

KELLY, J.:—In the evening of the 30th November, 1913, a buggy in which the plaintiffs were driving, on Court street, in the city of Port Arthur, was run into by a motor car owned by the defendant Whalen and driven by the defendant Smith. Smith was the servant of the defendant Fisher, who, as he himself says, was "running the garage" in which the motor car was then being kept, it having been placed there by Whalen. For what purpose it was there is not made quite clear; but there is evidence that it was kept there at times; it seems to have been there at this time either for the purpose of being repaired or to be cared for or kept for the defendant Whalen, who was then absent from Port Arthur, and had no knowledge of the car being out of the garage when the accident happened. Smith, in the course of his employment by Fisher, took the car from the garage to bring in Fisher's car, which had broken down in another part of the city. Smith says he thought this car was a demonstrating car—an expression the meaning of which is given by Fisher as "a car that is kept for shewing it off to prospective buyers." Smith's further evidence is, in answer to a question as to whether he had ever driven the defendant Whalen, that he had been to his house and brought the car back, and that he had driven Mrs. Whalen on half a dozen occasions; and he adds that Whalen was in the habit of having the car taken to the garage to be repaired. The action was tried before the Senior Judge of the District Court of the District of Thunder Bay, without a jury, who gave judgment in favour of the plaintiffs for \$500 and costs against all the defendants, with relief over in the defendant Whalen's favour against his co-defendants, for whatever amount he might be compelled to pay for damages or costs. The learned Judge's decision as to Whalen's liability at law was given after deliberation, and a consideration of the law.

The present appeal is by Whalen only, the other defendants having failed to prosecute their appeal, of which they had given notice.

The one question to be determined is, whether, in the circumstances, the appellant can be held liable for what took place. The statutory provision in force at the time of the accident relating to the liability of the owner of a motor vehicle is 2

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Geo. V. ch. 48, sec. 19, as follows: "The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council." This is a far-reaching provision and imposes grave responsibility upon an owner. It has been under review in our Courts in more than one case, to define the limit of liability, as well as to determine the meaning of the word "owner."

In *Wynne v. Dalby*, 30 O.L.R. 67, the main question at issue in appeal was, whether the word "owner" included a manufacturer who, in his contract for sale of a motor car on periodical payments, reserved ownership to himself until payment in full, but who on the making of the contract delivered the car to the purchaser, who operated it for his own use and benefit, and whose servant caused injury to the plaintiff, for the consequences of which it was sought to hold the vendor liable as owner. The Court there drew a distinction in favour of the vendor, expressing the opinion that sec. 19 could not have been intended to fix the very serious responsibility which the section imposes, upon one who, at the time the accident happened, had neither the possession of nor the dominion over the vehicle. "Dominion," in the light of that decision, is an important element in determining where liability lies.

The appellant is far from occupying the position held by the vendor in that case. At the time of the occurrence he was undoubtedly the real owner of the car. Not only was he the owner, but he retained that dominion over it which left the control and direction of it in himself and his authorised agents. It was by his voluntary act that his vehicle was in Fisher's possession; he chose the latter as its custodian, whether for the purpose of being repaired or to be cared for, it matters not; and, by so doing, he put it in the power of Fisher and his servants so to use it, or misuse it, as to cause injury to others under such conditions as would render an owner liable except in cases where he could escape liability by reason of the car having been stolen. What would have been the result had the appellant given to Fisher for a limited time all the rights of ownership, as referred to by Lord Herschell in *Baumwell, Manufactur von Carl Scheibler v. Furness*, [1893] A.C. 8, it is unnecessary to

discuss. There is no evidence of any granting of such limited ownership.

Argument was directed to the effect of the decision in appeal in *Loury v. Thompson*, 29 O.L.R. 478, and *Cillis v. Oakley*, 31 O.L.R. 603. I think the present case is to be decided without necessarily invoking the aid of these cases; for it is not clear on the evidence that the appellant had not some knowledge that Fisher might use the car, or at least that he did not expect or that he had no reason to expect that he would use it. In these circumstances, stealing or theft there was not, in the sense contemplated by these decisions, or in the sense of the amendment made to sec. 19 by 4 Geo. V. ch. 36, sec. 3, passed after this cause of action arose. That amendment declares that the owner is not liable where, at the time of the violation of the Act, the motor vehicle was in the possession of a person, not being in the employ of the owner, who had stolen it from the owner.

Serious as this application of sec. 19 may seem, I am of opinion that it applies so as to render the appellant liable, in the circumstances here presented. The Legislature's evident aim was to place responsibility where it would be effective, by casting the burden of ensuring safety, so far as possible, against the careless driving of reckless and irresponsible persons, upon the owner who retains dominion over the vehicle, and who has it in his power to choose the person to whom he entrusts it.

Appeal dismissed.

[IN CHAMBERS.]

RE M., AN INFANT.

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DOWNS
v.

FISHER.

—
Kelly, J.

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April 9.

Infant—Custody—Husband and Wife—Separation Agreement—Provision Giving Wife Custody of Child with "Right of Access" by Husband—Construction.

By a separation agreement, charge and control of the child of the marriage, a girl under three years of age, were given to the wife, the husband paying for its maintenance and education; this agreement was not to be an admission on his part that his wife should always have the charge and control of the child, and was not to prejudice him should he desire to have its custody; the husband was to have access to the child at any reasonable time, upon notice:—

Held, upon an application by the father for an order for the custody of the child, or for an order declaring the construction of the separation

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agreement so far as it related to the custody of the child, that there was nothing to justify the giving of the custody to the father, and it was in the interest of the child that it should remain in the mother's custody.

2. That, under the agreement, the father was entitled to access to the child only while it was in the mother's custody and control; and, in the absence of any stipulation therefor in the agreement, it could not be said that the mother was guilty of any breach of its provisions by remaining in the room in her house in which the father was permitted to see the child, during the times of the father's visits.

The meaning of "right of access" considered.

Evershed v. Evershed (1882), 46 L.T.R. 690, and *Rice v. Frayser* (1885), 24 Fed. Repr. 460, referred to.

MOTION by the father of an infant for an order for its custody, or, in the alternative, for an order construing a separation agreement so far as it related to the custody of the child.

The motion was heard by MIDDLETON, J., in Chambers.

E. G. Long, for the applicant.

G. H. Kilmer, K.C., for the applicant's wife, the mother of the child.

April 9. MIDDLETON, J.:—Unfortunately the relations between the husband and wife are most unhappy, and there is no prospect or possibility of reconciliation. The child, a little girl, was born on the 11th July, 1912. Upon the separation, "charge and control" of the child were given to the wife, the husband paying for its support, maintenance, and education: this agreement not being an admission on his part that the wife shall always have the control and charge of the child, and not to prejudice him in any way should he desire to have its custody. The agreement then stipulates that the husband "shall have access to the said child at any reasonable time, upon sending notice to (the wife) that he desires such access."

Correspondence has taken place between the solicitors with reference to the time and mode of access, and it has been arranged that the father shall have access to the child at the apartments of the wife's mother once a week. The husband's grievance is, that during his visit the mother, as well as the child's nurse, remains in the room with the child. The husband desires that the child may be taken elsewhere for the purpose of allowing him to be with it free from any adverse influence or control—or, in the alternative, that such arrangements may

be made that during his visit to the wife's apartments she may not be present with the child.

Upon the material there is nothing to justify my making any order giving the father custody of the child. It is manifestly in the interest of the child that it should remain in the mother's custody; and I do not think that I can use the threat of an order to deprive the mother of the custody for the purpose of compelling a course of conduct on her part which might appear to be reasonable. The parties have made their agreement; and all I can do is to construe the agreement as I find it.

At the same time I may say that I am not satisfied that there is any reason why the wife should refuse to afford to the husband the satisfaction of being alone with his child during the short visit that he pays to it at her apartments. There is no reason to suppose that the father would be in any degree unkind to the child, and the mother and nurse could both be within easy reach so as to look after the child if any occasion should arise.

This case affords an illustration of the fact that there are many things which cannot be worked out through the Courts, and must be left to the good sense of the parties concerned. As said in lines generally attributed to that wise man of the world Samuel Johnson—

“How small of all that human hearts endure

“That part which laws or Kings can cause or cure.”

All that the agreement gives to the father is a “right of access” to the child. I find that these words are employed not only in statutes but in the forms given for orders dealing with the custody of children and in precedents for separation agreements. I should, therefore, have expected to find somewhere an exposition of what this right of access really involves.

The only case which I have found is *Evershed v. Evershed* (1882), 46 L.T.R. 690, where Kay, J., had before him for interpretation an agreement which referred to counsel the settlement of a formal deed, which was to contain “all usual terms as to access to children, etc.” Specific performance of this agreement was sought, and the question was, whether the mother, who

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was there entitled to access, should during the periods of access have the custody of the children. Mr. Justice Kay thought she had not that right: "Access is a thing which can only be dealt with after the question of custody is determined; it means access to children who are in the custody of some other person. Custody is a much larger and more important thing than access."

In an American case, *Rice v. Frayser* (1885), 24 Fed. Repr. 460, there is a discussion of the meaning of the word "access" when used in relation, not to children, but to property in the possession of a trustee. Access, it is said, means liberty to approach and inspect the property. Possession means much more than access. Access implies possession in another. This accords well with what was said by Mr. Justice Kay.

I think the meaning of the clause which I have quoted from this separation agreement is, that the father is entitled to access to the child only while it is still in the mother's custody and control; and I cannot say, in the absence of any stipulation in the deed, that the mother is guilty of any breach of its provisions by remaining in the room when the father is seeing the child. It is clear, I think, that the father has no right to have the child taken to his house or in any way to have it taken out of the mother's custody and control. He must be content with access to it while still in her custody and control.

Notwithstanding the view that I entertain of the legal rights of the parties, I repeat what I have said, that I think the mother would be acting more in the real interest of her child if she would forgo her right to be present in the room—for she must appreciate what a source of embarrassment her mere presence must be to her husband.

The husband must pay the wife's costs of these proceedings.

[MIDDLETON, J.]

RE ROURKE.

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April 15.

Lunatic—Order Declaring Lunacy—Reference—Jurisdiction of Master—Duty of Committee—Payment into Court—Lunacy Act, 9 Edw. VII. ch. 37, sec. 11 (d)—Passing Accounts after Death of Lunatic—Special Reference—Practice—Payments Made out of Lunatic's Property—Gifts—Approval of Lunatic—Alleged Recovery of Sanity—Inquiry as to—Validity of Payments—Power to Supersede Declaration of Lunacy after Death—Lunacy Act, R.S.O. 1914, ch. 68, sec. 10—Issues between Donees and Beneficiaries of Estate.

The property of persons not *sui juris* should not be left for private investment, but should be paid into or lodged in Court and become subject to the general system of administration, by which the interest is punctually paid and the corpus is always forthcoming when needed.

This rule, laid down, not for the first time, in *Re Norris* and *Re Drope* (1902), 5 O.L.R. 99, received legislative sanction and approval on the revision of the Lunacy Act in 1909: 9 Edw. VII. ch. 37, sec. 11 (*d*).

Where the Court by order declared a person to be a lunatic, and directed a reference to a Master to appoint a committee—who should pass his accounts annually and pay into Court balances found in his hands—and to propound and report a scheme for the maintenance of the lunatic, it was *held*, that the Master had, upon the reference so directed, no jurisdiction, after the death of the lunatic, to enter upon an inquiry with a view of ascertaining whether the lunatic had in fact, some years before his death, become of sound mind and capable of managing his own affairs, so that certain payments, in the nature of gifts, made by the committee out of the lunatic's property, with the knowledge and approval of the lunatic, might be validated.

By the well-established practice, a special reference is, upon the death of the lunatic, ordered to pass the accounts of the committee, those beneficially interested in the accounts being then represented by the person administering the estate of the lunatic, and no notice being given to the beneficiaries.

If there was jurisdiction to make a new order directing the Master to inquire into and determine the competency of the lunatic to make the gifts, and the validity of the gifts, such an order should not be made, unless those really interested—the donees and those beneficially interested in the estate—were adequately and properly represented.

An order superseding the declaration of lunacy cannot be made after the death of the lunatic. Section 10 of the Lunacy Act, R.S.O. 1914, ch. 68, contemplates a superseding order only for the purpose of restoring the person to the management of his own affairs.

MOTION by Christine Holford, executrix of the will of Dennis Rourke, who was committee of the person and estate of James Rourke, declared a lunatic by order of the 16th June, 1908, by way of appeal from the ruling of the Local Master at Sandwich that he had no jurisdiction to inquire whether the lunatic had in fact become of sound mind and capable of managing his own affairs before his death, which occurred on the 11th Novem-

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ber, 1913, so that certain payments made by the committee, who died on the 4th July, 1913, said to have been made with James Rourke's knowledge and approval after he had regained his sanity, might be validated; or, in the alternative, for an order directing a reference to the Master to inquire into and determine the competency of James Rourke and the validity of the payments; or for an order declaring that James Rourke became of sound mind and capable of managing his own affairs upon his discharge from a lunatic asylum on the 1st March, 1910.

No proceedings were taken to supersede the order declaring lunacy, and the property of James Rourke remained in the custody and control of the committee until the death of the committee.

April 8. The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

E. A. Cleary, for Christine Holford.

A. C. Heighington, for some of the persons interested in the estate of James Rourke.

April 15. MIDDLETON, J.:—On the 16th day of June, 1908, on the petition of Dennis Rourke, brother of the lunatic, insanity was declared, and it was referred to the Master at Windsor to appoint a committee, the committee being by the order required to pass his accounts annually and pay into Court balances found in his hands. The Master was directed to propound and report a scheme for the maintenance of the lunatic.

Pursuant to this order, on the 5th December, 1908, the Master reported that he had appointed the brother committee of the person and estate. He also reported the value of the real estate as \$23,487, and the value of the personal estate as \$18,167. The lunatic was confined in the Provincial Asylum.

The Master did not report, as required, any scheme for the maintenance of the lunatic, but he did do that which he was not required or authorised to do—he recommended that, after paying the necessary asylum dues, the committee might invest and keep invested the principal moneys and accumulation of in-

come, passing his accounts once a year. On the 18th December, 1908, an order was obtained in Chambers confirming this report of the Master, directing payment of specific sums for the maintenance of the lunatic, and directing that the scheme for the management of the lunatic's estate propounded by the Master should be approved.

In *Re Norris* and *Re Drope* (1902), 5 O.L.R. 99, my Lord the Chancellor laid it down as an invariable rule that the property of persons not *sui juris* should not be left for private investment, but should be paid into Court and become subject to the general system of administration, by which the interest is punctually paid and the corpus is always forthcoming when needed; and it is pointed out that this settled policy has been for many years embodied in the form of order invariably used (and it was used in the case in hand). My Lord further adds that much injury and loss has resulted in past times from the careless handling of the property of persons not *sui juris*, and that experience has shewn that no preponderance of advantage is gained by reason of any increased earnings of funds left in the hands of private individuals, to countervail the absolute security of the fund when in Court.

This policy, not then announced for the first time, received legislative sanction and approval on the revision of the Lunacy Act in 1909. By 9 Edw. VII. ch. 37, sec. 11 (*d*), the committee is required to give security, not only for the due accounting for the lunatic's estate, but for the payment into Court of the balances in his hands upon such accounting forthwith after the same shall have been ascertained or otherwise as the Court may direct.

The accounts of the committee were passed on the 18th December, 1909, shewing that the amount coming to the hands of the committee in cash was then \$15,093, and that a little over \$800 had been paid out in due course of administration; \$6,762 was invested in municipal debentures, and \$7,499 was in hand as cash uninvested. The committee was allowed \$400 for his services.

The lunatic, having apparently improved mentally, was dis-

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charged from the asylum on the 1st March, 1910, and he then went to live at the House of Providence, conducted by the Sisters of St. Joseph, at London, Ontario, where he resided until the time of his death on the 11th November, 1913.

No proceedings were taken to supersede the order declaring lunacy, and the property remained in the custody and control of the committee until he died on the 4th July, 1913.

In August, 1912, the committee, owing to the feeble condition of his health, handed over the management of the affairs of the committee to his son-in-law, Ignatius Holford.

Christine Holford, the wife of Ignatius, has taken out letters probate to the estate of the committee, and Ignatius has taken out letters of administration to the estate of the lunatic.

Without obtaining any order authorising a reference, and in assumed pursuance of the obligation to pass accounts contained in the original order, the husband and wife proceeded to pass the accounts before the Local Master. In the accounts brought in before the Master, the wife, as representing the committee, seeks to have allowed to her \$2,450 said to have been paid to J. R. Rourke, one of the sons of the committee, as a donation. She also seeks to have allowed the sum of \$2,500, \$2,400 of which was paid on the 17th September, 1912, to her sister Mary McBride, also as a donation, and three sums aggregating \$350 paid to the House of Providence as a donation.

Between the husband and wife, in their respective capacities, there is no lack of harmony, but the Local Master somewhat disturbed this state of felicity by directing notice to be given to some of those beneficially interested in the lunatic's estate; and, not unnaturally, objection is being taken to the allowance of these sums.

The learned Local Master was invited to go into an inquiry with a view of ascertaining whether the lunatic had in fact become of sound mind and capable of managing his own affairs, so that these payments, said to have been made with his full knowledge and approval, would constitute full and valid gifts. Those opposed to the allowing of these payments denied the Master's jurisdiction to enter on this tempting field of inquiry, and the Master certified that in his view he had no jurisdiction.

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From this ruling an appeal is now had by the executrix of the committee.

I think it is clear that the learned Master is quite right, and that he had no jurisdiction to enter upon this inquiry; in fact, it also appears reasonably clear that the learned Master has no jurisdiction to enter upon any inquiry, as the order under which he is acting contemplated the passing of the accounts of the living committee of a living lunatic. The practice has been well established that, upon the death of the lunatic, a special reference is made to pass the accounts of the committee, those beneficially interested in the accounts being then represented by the administrator or executor of the lunatic. There is no provision in such orders in ordinary cases for notice being given to those beneficially interested in the estate.

In the alternative the applicant now asks for an order referring to the Master to inquire into and determine the competency of the late James Rourke to make the gifts, and the validity of the gifts. I do not think that this is an inquiry that should be entered into in this way. The real issue is one between the donees on the one side and those beneficially interested in the estate on the other; and I do not think that any good purpose would be served, even if there is jurisdiction to make the order sought, and the order should otherwise be deemed appropriate, by directing an inquiry in which these really interested on either side are not adequately and properly represented.

As a further alternative, I was asked now to make an order declaring that James Rourke become of sound mind and capable of managing his own affairs upon discharge from the asylum in December, 1909. I do not think that any order superseding lunacy can be made after the death of the lunatic. Section 10 of the Lunacy Act, R.S.O. 1914, ch. 68, contemplates the superseding order only for the purpose of restoring the person to the management of his own affairs.

Beyond this, the material filed is entirely inadequate. Christine Holford made an affidavit which does not state anything concerning her uncle's mental condition. A certificate from the Inspector of Prisons and Charities is produced, in which it is stated that it has been certified to him that James Rourke has

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become of sound mind. An affidavit is produced from Catharine O'Connell, known in religion as Sister Scholastica, who was in charge of the ward in the House of Providence at London, in which she states that Mr. Rourke was competent. This is altogether inadequate, having regard to what is laid down in all the books as necessary upon a motion of this kind.

It appeared to me exceedingly desirable that the real issues should be tried out between those concerned, and I suggested that the present matter should remain in abeyance until such issues could be tried, but in a way that would be free from all technical advantage or disadvantage to either party. Each side appeared confident of some advantage from the present unsatisfactory position of affairs, and insisted upon the matter being dealt with on the basis of strict rights. This being so, no course is open to me save to dismiss this motion with costs to be paid by the applicant to the respondents, leaving the parties to work their way as best they can out of the chaos in which they have involved themselves.

[APPELLATE DIVISION.]

1914

June 30.

McPHERSON v. UNITED STATES FIDELITY AND GUARANTY CO.

1915

McGUIRE v. MCPHERSON.

April 19.

Execution—Judgment—Satisfaction—Interpleader Issue—Judgments Recovered for Instalments of Purchase-price of Mill—Resale of Mill by Vendor—Sale of Interest in Land or of Chattel—Effect upon Judgments—Costs—Interpleader Bond—Rights of Execution Creditors—Limitation.

On the 3rd August, 1907, an agreement was made between McP. and McG. and reduced to writing. McG. agreed to buy a certain "saw-mill and machinery, as it stands to-day, at the sum of \$7,500, to be delivered in as good state and condition as at the present, at the end of the present season of sawing." McP. recovered judgments against McG. in two actions for instalments of the purchase-money, and placed writs of execution in the sheriff's hands. The sheriff, having in his hands also executions of B. against McG., seized certain logs, which were claimed by a lumber company, and an interpleader issue was ordered to be tried, in which McP. and B. were plaintiffs and the lumber company was defendant. This issue was finally decided in favour of McP. and B. in November, 1912: *McPherson v. Temiskaming Lumber Co.*, [1913] A.C. 145. The mill and machinery remained unmoved till January, 1913, when McP. sold them for \$1,750. He also sold the land upon which the mill stood. In an action by McP. and B. upon the interpleader bond and upon an issue directed to be tried for the purpose of determining whether the judgment recovered by McP. had been satisfied in whole or in part, it

was held, by MIDDLETON, J., the trial Judge, following *Lavery v. Pursell* (1888), 39 Ch. D. 508, that the mill was to be regarded as land; and, following *Cameron v. Bradbury* (1862), 9 Gr. 67, and *Gibbons v. Cozens* (1898), 29 O.R. 356, that by reselling McP. had precluded himself from afterwards proceeding upon his judgments, even for the balance of his claim after crediting the \$1,750; but had not precluded himself from enforcing the judgments for the costs thereby awarded. And therefore the executions in respect of the instalments should be directed to be withdrawn, and the executions with respect to costs should be declared to remain in force.

Upon appeal, the four Judges composing a Divisional Court of the Appellate Division were equally divided in opinion.

Per FALCONBRIDGE, C.J.K.B., and LATCHFORD, J.:—The contract was not for the sale of land or an interest in land; and the resale by McP. did not prevent the further enforcement of the judgments. If McP. was guilty of any abuse of the power of resale of the mill and machinery as chattels, McG. had his remedy by action for such abuse.

HODGINS, J.A., and KELLY, J., *contra*, agreeing with the opinion of MIDDLETON, J.

Review of the authorities.

Held, also, by MIDDLETON, J., and affirmed by the Divisional Court, that the liability of the obligors upon the interpleader bond was not confined to the amount remaining due on the executions of McP. and B.—other creditors having executions in the sheriff's hands were entitled to share in the fund represented by the bond.

ACTION by Allan McPherson and William Booth upon an interpleader bond made by the defendant the United States Fidelity and Guaranty Company; and an issue directed to be tried for the purpose of determining whether the judgments in the actions of *McPherson v. McGuire* had been satisfied in whole or in part. The plaintiffs in the issue were A. McGuire & Co. and Annie McGuire, and the defendant was Allan McPherson. See *McPherson v. Temiskaming Lumber Co.* (1912), 2 O.W.N. 553, 3 O.W.N. 36, [1913] A.C. 145.

May 26, 1914. The action and issue were tried together by MIDDLETON, J., without a jury, at Toronto.

W. Laidlaw, K.C., for McPherson and Booth.

G. H. Kilmer, K.C., for the United States Fidelity and Guaranty Company and A. McGuire & Co. and Annie McGuire.

June 30, 1914. MIDDLETON, J.:—On the 3rd August, 1907, an agreement was made between McPherson and McGuire dealing with many matters. Clause 10 is the only one now of importance. McGuire agreed "to buy the McLean saw-mill and machinery, as it stands to-day, at the sum of \$7,500, to be de-

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livered in as good state and condition as at the present, at the end of the present season of sawing."

In April, 1908, a further agreement was arrived at by which the price of the mill was agreed to be paid in three annual instalments, of \$2,500 each, with interest, the first instalment to be paid in one year.

In December, 1908, an accounting took place, and an agreement was drawn embodying the result of the accounting.

An action was brought to recover the first instalment of the price of the saw-mill and other moneys alleged to be due to McPherson. In this action judgment in the first instance went by default; and, upon an application being made, the action was allowed to proceed in order to ascertain the amount due, the judgment in the meantime standing as security to the plaintiff. The result of the litigation was to reduce the amount for which judgment had been signed from \$3,961 to \$3,232.42; but the execution issued upon the judgment has not been correspondingly amended. It was agreed by all parties that this should now be done. As the result of this litigation, further costs were awarded, and executions have been issued for these, \$504.17 and \$78.98.

When the second instalment came due, another action was brought. Judgment was recovered in it for \$2,590.62 and \$135 for costs.

In addition to these executions, two other executions were issued by Booth for \$1,007.50, but it is admitted that there is only one debt. This makes a total upon the executions in the sheriff's hands, exclusive of sheriff's fees, of something in the neighbourhood of \$9,500, when interest is added.

The sheriff seized certain logs. These were claimed by the Temiskaming Lumber Company Limited. An interpleader issue was directed, and it was provided that upon the lumber company giving to the execution creditors, McPherson and Booth, security for the amount of the appraised value of the goods seized, after deducting the sum of \$6,381, the Crown dues, the sheriff would withdraw from possession.

Although all these different writs of execution were in the hands of the sheriff, the interpleader issue referred to McPherson.

son's writ under the first judgment and Booth's writ, by an erroneous date; but the issue was, whether, at the time of the seizure, the goods were the property of the claimant as against the execution creditors.

An interpleader bond was given by the defendant company in the penal sum of \$10,000. It recites the recovery of McPherson's first judgment, \$3,961, Booth's judgment for \$1,007.50, giving the correct date of the execution, the interpleader order, and the terms under which the sheriff was to withdraw from possession; and the condition is then that if, upon the trial or determination of the said issue, the finding is in favour of McPherson and Booth, the company shall pay to them \$10,000, or a less amount, according to the direction of any order to be made in the matter of the interpleader.

The interpleader issue was finally determined in favour of the execution creditor, upon an appeal to the Privy Council, on the 19th November, 1912: *McPherson v. Temiskaming Lumber Co.*, [1913] A.C. 145.

The first contention now made arises from the fact that after the recovery of the judgments for the two instalments of the purchase-price of the mill, McPherson sold, not only the land upon which the mill was, but the mill itself. McPherson claims that he did this with the knowledge and approval of McGuire. I do not think he has established any agreement with McGuire authorising the sale. The mill stood upon the land, unused and deteriorating. Insurance and taxes had accumulated against it, amounting to \$1,200. It was sold for \$1,750. McPherson is ready to allow this sale to wipe out any balance due to him by McGuire, without prejudice to his claim against the defendant company. What is contended is that this resale by the vendor operates, as a matter of law, to wipe out the judgments obtained for the past-due instalments.

Some difficulty exists in determining whether or not any land should pass to McGuire under the purchase of the mill. I think it is clear that the mill was purchased with the idea of removing it from the property and taking it to the timber limits, which were sold contemporaneously, and that it was not the intention of the parties that any land should pass.

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The contention of Mr. Kilmer is that, notwithstanding this, the contract is a contract for the sale of land, and that the resale by the plaintiff prevents the further enforcement of the judgment.

In *Lavery v. Pursell* (1888), 39 Ch.D. 508, it was held by Mr. Justice Chitty that the sale of the building materials of a house, with the condition that such building should be taken down and the building materials removed from the land, was a contract for sale of an interest in land. I think I should follow this case. It purports to distinguish the sale of materials in an existing building from a case of the sale of growing timber. The distinction is by no means easy to follow. I do not think that Mr. Justice Chitty is to be taken as dissenting from the view expressed in *Marshall v. Green*, but rather as distinguishing the case of a building from the case of a tree growing upon the land. *Marshall v. Green* (1875), 1 C.P.D. 35, to which he refers, is cited with unqualified approval in *Kauri Timber Co. v. Commissioner of Taxes*, [1913] A.C. 771.

If this building is to be regarded as land, then, according to the decision in *Cameron v. Bradbury* (1862), 9 Gr. 67, and *Gibbons v. Cozens* (1898), 29 O.R. 356, by reselling the vendor has precluded himself from afterwards proceeding upon his judgments for the balance of the claim.

I do not think that this precludes the enforcing of the judgments for the costs thereby awarded. These costs are not, like interest, accessory to the demand, but are damages awarded to compensate for the trouble and expense to which the plaintiff is put by the litigation. They are a new and independent cause of action.

If I am right in these findings, it follows that the executions in respect of the instalments should be directed to be withdrawn, owing to the resale of the mill by the plaintiff McPherson, and that the executions with respect to costs should be declared to remain in force.

The defendants make a further contention which requires to be carefully examined. At the time the claimant acquired title there were only the earlier executions in the sheriff's hands, and the issue was confined to these executions. I quite agree

with Mr. Laidlaw's contention that the interpleader order was intended to be, and is, wide enough to allow other creditors to come in and participate with their executions; but the point is that the judgment of the Judicial Committee ([1913] A.C. 145) merely determines the invalidity of the claimant's title as to the executions in the hands of the sheriff at the time that title was acquired. The head-note states accurately the ground of decision: "Where execution is levied upon timber cut by an assignee of the license under an assignment made subsequently to the issue of the writ, the levy is valid unless it is shewn that the assignee acquired his title in good faith and for valuable consideration without notice of the execution and has paid his purchase-money." The concluding paragraph of the reasons for judgment (p. 159) is: "In the result, their Lordships are of opinion that the rights of both of the appellants under the three executions referred to fall to be satisfied out of the \$10,000 secured by the bond." From this it is argued that the effect of the judgment is to confine the liability of the defendants to the amount remaining due on these three executions.

I cannot assent to this, because it is clear that it is held that the Temiskaming Lumber Company never became in fact a *bonâ fide* purchaser—that its whole claim was fraudulent—and, therefore, I think it should be held that it was invalid as to all the executions which became entitled to share under the interpleader order.

The bond provides for payment of the full \$10,000 or a less amount thereof, according to the directions of any order of the Court or Judge to be made in the matter of the interpleader. I drew the attention of counsel to this, and they consented to my dealing with the matter upon the theory that such an application had been made. I think that the amount should be reduced so as to cover the costs due to McPherson and any further balance outside of the instalments of the purchase-money of the mill. As I understand the case, the first judgment covers more than the first instalment.

In the result, I think that the Booth execution and the other executions placed in the sheriff's hands, so far as they are not

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wiped out by the declaration I have made, are entitled to share. If the parties cannot agree upon the amount, I may be spoken to.

As the defendants did not pay into Court anything upon the bond, I think they should pay the costs of the action, and that McPherson should pay the costs of the issue.

Allan McPherson and William Booth appealed from the part of the judgment of MIDDLETON, J., which adjudged that the sale of the saw-mill by Allan McPherson operated as a matter of law to wipe out the judgments obtained by him for the past-due instalments upon the sale of the saw-mill, and that the executions issued upon the said judgments and delivered to the sheriff should be withdrawn.

The United States Fidelity and Guaranty Company and A. McGuire & Co. and Annie McGuire also appealed from the judgment, upon the following grounds: (1) that the Temiskaming Lumber Company, at the time of the transfer from A. McGuire & Co. to them of the timber license, had no notice of the executions of Allan McPherson against A. McGuire & Co. dated the 30th May, 1910, the 30th June, 1910, and the 7th July, 1910; (2) that, as to the execution dated the 7th July, 1910, the debt having been declared satisfied, the costs were also satisfied; and (3) that the land was sold with the mill.

January 15. The appeal and cross-appeal were heard by FALCONBRIDGE, C.J.K.B., HODGINS, J.A., LATCHFORD and KELLY, JJ.

W. Laidlaw, K.C., for the appellants in the first appeal, argued that the contract for the sale of the mill to McGuire was not a contract for the sale of land or of an interest in land, but for the sale of a chattel, and that the resale by the appellant McPherson did not prevent him from realising upon his executions. He referred to *Cameron v. Bradbury*, 9 Gr. 67; *Gibbons v. Cozens*, 29 O.R. 356; *Fraser v. Ryan* (1897); 24 A.R. 441; *Jackson v. Scott* (1901), 1 O.L.R. 488, at p. 492; *Walton v. Jarvis* (1856), 13 U.C.R. 616; Halsbury's Laws of England, vol. 25, para. 357; Chalmers' Sale of Goods Act, 7th ed., p. 142; *Marshall v. Green*, 1 C.P.D. 35, at p. 42; Browne on the Statute

of Frauds, 5th ed., para. 234; Chitty on Contracts, 16th ed., p. 368; Benjamin on Sale, 7th ed. (Am.), para. 794; *Brown v. Dulmage* (1907), 10 O.W.R. 451; *Re Henderson Roller Bearings Limited* (1911), 24 O.L.R. 356.

G. H. Kilmer, K.C., for the respondents in the first appeal, the appellants in the second appeal, contended that the contract for the sale of the mill was a contract for the sale of an interest in land: *Lavery v. Pursell*, 39 Ch.D. 508. By the subsequent sale of the property by the appellant McPherson, the executions were satisfied, and the defendants could not be pursued further in respect of the debt: *Henty v. Schröder* (1879), 12 Ch.D. 666; *H. H. Vivian Co. Limited v. Clergue* (1914), 32 O.L.R. 200. Upon the cross-appeal, it was contended that the additional executions should not be admitted to share.

Laidlaw, in reply.

April 19. FALCONBRIDGE, C.J.K.B.:—Appeal by the plaintiffs and cross-appeal by the defendants from the judgment of my brother Middleton, in which the facts are very fully stated.

The learned Judge states the principal point and finds the only fact as follows: "Some difficulty exists in determining whether or not any land should pass to McGuire under the purchase of the mill. I think it is clear that the mill was purchased with the idea of removing it from the property and taking it to the timber limits, which were sold contemporaneously, and that it was not the intention of the parties that any land should pass. The contention of Mr. Kilmer is that, notwithstanding this, the contract is a contract for the sale of land, and that the resale by the plaintiff prevents the further enforcement of the judgment."

He thinks he should follow, and does follow, the case of *Lavery v. Pursell*; and the questions for us to decide are: (1) whether it has application to this case and whether we also should follow it; and (2) whether the sale of the saw-mill was a sale of an interest in land.

The case is reported in 39 Ch.D. 508. Pursell sold Lavery by public auction "the valuable building materials of the spacious premises in Milk street, Cheapside . . . the Constitutional

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Club.” The conditions of sale were: (2) Purchase-money to be paid, and contract signed, on the fall of the hammer, and possession given to take down and remove materials, etc. (3) Materials to be cleared away before the *11th January, 1887*, after which date materials not cleared away *to be forfeited*—and “purchaser’s right of access to the ground shall *absolutely cease*.” (9) On non-compliance by purchaser, the contract to be annulled, and price absolutely forfeited to the vendor. The plaintiff, by his agent, bought at £565, and signed the contract, subject to the conditions of sale, “which I agree to abide by in every respect,” and also, by his agent, deposited £100, and made default; and, on the 17th December, 1887—11 months after the sale—the vendor terminated the contract—“the agreement for the purchase of the building materials must be considered at an end”—and returned the £100 which had been paid as a deposit, and excluded the purchaser from the premises and from the removal of the building materials. The plaintiff then commenced the action, for specific performance and for damages—and failed. The learned Judge (Chitty) holds the contract to be for the sale of an interest in or concerning land within sec. 4 of the Statute of Frauds, and accordingly, from the absence of any sufficient description in the vendor’s contract, avoided. He suggests (p. 517) that *Marshall v. Green*, 1 C.P.D. 35, “may be open hereafter to further consideration.” He distinguishes the latter case as follows: “. . . when the case is examined as a whole it will be seen that the judgment turned upon this, that they considered that as the trees were to be cut down as soon as possible, and were almost immediately cut down, the thing sold was a chattel. . . . The true basis of his (Lord Justice Brett’s) judgment is, I think, to be found in the same page, where he says: ‘the contract is not for an interest in the land, but relates solely to the thing sold itself.’”

My brother Middleton, thinking that *Lavery v. Pursell* is to be followed and the mill regarded as land, holds that, according to the decisions in *Cameron v. Bradbury*, 9 Gr. 67, and *Gibbons v. Cozens*, 29 O.R. 536, the vendor by reselling has precluded himself from afterwards proceeding upon his judgment for the balance of his claim.

In *Marshall v. Green*, 1 C.P.D. 35, it was held that a sale of growing timber, to be taken away as soon as possible by the purchaser, is not a contract of sale of land, or any interest therein, within the 4th section of the Statute of Frauds. Lord Coleridge, C.J., says, at p. 39: "I find the following statement of the law with regard to this subject, which must be taken to have received the sanction of that learned Judge, Sir Edward Vaughan Williams, in the notes in the last edition of Williams' Saunders upon the case of *Duppa v. Mayo*,* p. 395: 'The principle of these decisions appear to be this, that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for the goods. This doctrine has been materially qualified by later decisions, and it appears to be now settled that, with respect to emblements or *fructus industriales*, etc., the corn and other growth of the earth which are produced not spontaneously, but by labour and industry, a contract for the sale of them while growing, whether they are in a state of maturity or whether they have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest in land, but merely for the sale of goods.' "

Brett, J., says, at p. 42: "Then there comes the class of cases where the purchaser is to take the thing away himself. In such a case where the things are *fructus industriales*, then, although they are still to derive benefit from the land after the sale in order to become fit for delivery, nevertheless it is merely a sale of goods, and not within the section. If they are not *fructus industriales*, then the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive

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benefit from so remaining; then part of the subject-matter of the contract is the interest in land, and the case is within the section. But if the thing, not being *fructus industrialis*, is to be delivered immediately, whether the seller is to deliver it or the buyer is to enter and take it himself, then the buyer is to derive no benefit from the land, and consequently the contract is not for an interest in the land, but relates solely to the thing sold itself."

The only thing sold or intended to be sold in this case was the saw-mill, and the contract is manifest from the agreement to give the chattel mortgage on the saw-mill when moved to the limits. See *Kauri Timber Co. v. Commissioner of Taxes*, [1913] A.C. 771, approving the principle, and accepting the note in Saunders, cited in *Marshall v. Green*.

In *Walton v. Jarvis*, 13 U.C.R. 616, the goods in question—an engine and boiler—had been in a saw-mill which was burned down, and remained there, set in brick and bolted to timbers let into the ground. *Per* Robinson, C.J. (p. 619): "Then it comes to be considered whether, while the things stood there attached to the freehold, it was competent to Fergusson, the owner of the fee, to make a verbal sale of them, or whether the fourth section of the Statute of Frauds would apply. My present impression is, that the fourth section of the Statute of Frauds does not apply to anything of this nature—affixed to the soil, but deriving no nourishment from it, like trees or grass growing; but the sale of such things so situated would in effect amount to nothing more, while they continued so attached, than a license to enter upon the land and detach them from it."

Halsbury, *Laws of England*, vol. 25, p. 207, para. 357: "Where by the terms of the contract the goods are to be taken by the buyer from the seller's land or premises, the contract of sale by implication confers on the buyer a license by the seller to the buyer to enter upon the land or premises to remove the goods. Such license is irrevocable, at any rate as regards any part of the goods, the property in which has passed to the buyer." Chalmers' *Sale of Goods Act*, 7th ed., p. 142: "'Goods' include all chattels personal other than things in action and money, and in Scotland all corporeal movables except money."

The term includes emblements [industrial growing crops], and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

The Sale of Goods Act is not in force here, but the underlying principle is thus indicated.

Applying these standards, I am of the opinion that this is not a contract for the sale of land, and that the resale by the plaintiff McPherson does not prevent the further enforcement of the judgment.

The rights of the unpaid seller against the goods are discussed in Halsbury, vol. 25, p. 239, paras. 421, 422; p. 263, paras. 460, 461.

In *Page v. Cowasjee Eduljer* (1866), L.R. 1 P.C. 127, Lord Chelmsford, delivering the judgment of the Court, says, at p. 145: "The authorities are uniform on this point, that if before actual delivery the vendor resells the property while the purchaser is in default, the resale will not authorise the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it which may be still due."

See Blackburn on Sale, 3rd ed., p. 481; at p. 482: "The precise extent of the seller's right between those limits is very much a matter of conjecture. It would seem that, viewing it as a practical question, the most convenient doctrine would be to consider the seller as entitled in all cases to hold the goods as a security for the price, with a power of resale to be exercised, in case the delay of payment was unreasonably long, in such a manner as might be fair and reasonable under all the circumstances. If the resale was conducted by the seller in a fair and reasonable manner, the original buyer who was in default would have no right to complain; if the resale produced a sum greater than the unpaid portion of the price, the buyer would be entitled to the surplus; if there was a deficiency, he would still remain indebted to the seller for that amount. If the buyer, previously to the resale, tendered all that was due, he would be entitled to consider the resale as altogether tortious, and to maintain trover against the seller; but if he did not make that tender,

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his remedy for an abuse of the power of sale would be by an action for that abuse, and not by an action of trover.”

If the plaintiff McPherson has been guilty of any abuse of the power of resale, the defendants would then have their remedy by action for such abuse. My recollection of the evidence at the trial of the original action before me is, that McGuire refused to take the mill; but that is not, I think, material.

The judgment should be reversed and the amount increased by the addition of the two sums of \$2,500 and interest, and the cross-appeal dismissed with costs—no fault can be found with the learned trial Judge’s conclusion as to this.

A calculation and statement has been handed in by Mr. Laidlaw since the argument. Counsel may attend before one of the Judges of this Division to settle the judgment.

Costs of the issue and motion to be paid by the United States Fidelity and Guaranty Company.

LATCHFORD, J.:—The main question upon this appeal is whether the plaintiff McPherson, after selling the saw-mill to McGuire & Co. and Devine, obtaining judgments against them for part of the price, and then reselling the mill, can still enforce his judgments otherwise than for costs.

I have had the advantage of reading the careful opinion of my Lord the Chief Justice of the King’s Bench, and concur in his judgment that the contract for the sale of the mill to McGuire was not a contract for the sale of an interest in land.

Nothing in the contracts between the parties indicated that any interest in land was the subject-matter of the sale.

In the agreement of the 3rd August, 1907, McGuire & Co. agreed with McPherson to purchase from him “the McLean saw-mill and machinery, as it stands to-day, at the sum of \$7,500, to be delivered . . . at the end of the present season of sawing.”

This contract, so far as it relates to the saw-mill, appears not to have been carried out. In April, 1908, the same parties and one Andrew Devine signed an agreement in which McGuire & Co. agreed to pay McPherson \$7,000 for the saw-mill, secured by a mortgage in the usual form, at the time of the delivery of

the mill, which is to be insured and kept insured for the benefit of the vendor "against loss by fire. . . . McPherson, having insured the mill since the date of the agreement of the 3rd August, 1907, is to be allowed to have the use of the saw-mill during the present season, and shall keep it in proper repair."

In their defence to the two actions in which McPherson recovered judgment, McGuire & Co., Annie McGuire, and Devine make no pretence that the saw-mill is regarded as anything more than a building. The 300 acres which McPherson owned nearby, part of which was used as a piling-ground, is not referred to. McGuire says he thought he could use the piling-ground if he wanted it: evidence, p. 19. "There was no discussion about the land:" p. 17. But that he was to move the mill is quite clear from his evidence: p. 19. McPherson said he understood McGuire was to remove the mill to the timber limits. Had there been any intention in the minds of the parties to deal with anything more than a saw-mill of a type quite common in Northern Ontario, which may be moved from place to place as exigencies require, there would necessarily have been some reference to the lands that were to pass with it. When ultimately the mill was resold by McPherson it was in fact moved off McPherson's lands, and the 300-acre lot was sold to a different purchaser.

If the sale to McGuire & Co. and Devine had been a sale of an interest in land, McPherson would be unable to enforce his judgment except for costs.

In *Jackson v. Scott*, 1 O.L.R. 488, Maclellan, J.A., said (p. 493): "As decided in *Cameron v. Bradbury*, 9 Gr. 67, the effect of rescission, after a judgment recovered for the purchase-money, or part of it, is that the obligation to pay the purchase-money has been terminated, and so to that extent the judgment cannot be enforced. It is still good at law, but equity will restrain its enforcement, on the ground that, having taken back the land, the vendor ought not to be permitted to recover any more of the purchase-money. That principle, however, does not apply to costs." On the same page, Moss, J.A., after referring to the notice of rescission given by the plaintiffs while their judgment was in force but unpaid, says: "The plaintiffs could no longer seek to enforce their judgment to any extent beyond

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recovery of the costs. The judgment would not be set aside and vacated and matters brought back to the same position as if it had never existed, *but it would be deemed satisfied*, except as to costs, so that thereafter in any proceeding taken to enforce it the defendant could set up the rescission as a defence, as in *Cameron v. Bradbury*, 9 Gr. 67; *Arnold v. Playter* (1892), 22 O.R. 608; and *Fraser v. Ryan*, 24 A.R. 441. Or, probably, it would be open to the defendant, offering proper terms as to costs and otherwise, to move to stay perpetually all further proceedings upon it."

In *Gibbons v. Cozens*, 29 O.R. 356, vendors, who had recovered judgment for a balance of purchase-money, gave notice subsequently of rescission, and brought an action for the recovery of the land. It was held that, while their judgment did not affect their right to terminate the contract, "they must of course provide in the judgment that no further proceedings are to be taken to recover the amount of the judgment for the purchase-money unpaid."

To a similar effect is the recent case of *H. H. Vivian Co. Limited v. Clergue*, 32 O.L.R. 200.

Nor is the law different in the case of a sale of chattels where the right of resale is expressly reserved to the vendor: *McEntire v. Crossley Brothers*, [1895] A.C. 457, 464; *Sawyer v. Pringle* (1891), 18 A.R. 218; *Arnold v. Playter*, 22 O.R. 608; *Utterson Lumber Co. v. H. W. Petrie Limited* (1908), 17 O.L.R. 570.

Where, however, such a right is not reserved, a resale by the vendor on default does not rescind the original sale. The leading distinction is that in such case the vendor in reselling is dealing with property which is no longer his, but his vendee's: *Osler, J.A.*, in *Sawyer v. Pringle*, 18 A.R. at p. 230. Benjamin on Sale, 7th ed. (Am.), p. 824, states the law to the same effect, adding that the vendor may refuse to give credit for the proceeds of the resale and claim the whole price, leaving the buyer to a counterclaim for damages for the resale.

The unpaid vendor has a special property in the chattel, analogous to that of a pawnee. To resell the goods on default is, however, a breach of his contract for which the actual damage suffered may be recovered against him.

I, therefore, am of opinion that the judgment appealed from should be set aside so far as it declares that the execution upon the judgments for the instalments on the mill should be withdrawn. The appellants should have their costs of the interpleader issue. In all other respects I would affirm the judgment. The respondents should have the costs of this appeal.

HODGINS, J.A.:—This action is on a bond given by the respondent company to the appellants, conditioned to pay the sum of \$10,000, as and for the price and value of logs seized by the sheriff, as mentioned in the bond, or any lesser sum in pursuance of the order of the Court or a Judge to be made in the matter of the interpleader in which the bond was given. The interpleader having been finally decided in favour of the appellants, they sue upon the bond, and the defence now raised is contained in paragraphs 12, 13, and 14 of the statement of defence in this action. They are as follows:—

“12. The plaintiff McPherson never tendered or delivered to the said A. McGuire & Co., Annie McGuire, and Andrew Devine, or any of them, a conveyance of the said saw-mill, and never gave the said parties or any of them possession thereof, but remained in possession thereof up to and including the 19th day of November, 1912.

“13. After the 19th day of November, 1912, the plaintiff McPherson dismantled the said saw-mill and took and carried away the machinery and the building and sold and disposed of the same, and, while the above proceedings were pending, sold and disposed of the land forming the site of the said mill, and received the proceeds thereof, and the plaintiff Allan McPherson is not now in a position to deliver the said mill and machinery or convey the said site thereof to the said A. McGuire & Co., Annie McGuire, and Andrew Devine, or any of them.

“14. The defendant the United States Fidelity and Guaranty Company says that, by reason of the sale and disposition of the said mill and mill-site, or either of them, the plaintiff McPherson is not now entitled to enforce the said executions, or any of them, or any of the said costs of obtaining judgment for the amount thereof, and that, by the acts of the plaintiff

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McPherson, his said judgments, and each and all of them, have been satisfied, and that the plaintiff McPherson is not now entitled to proceed to enforce the said executions, or any of them, or to enforce payment of the bond in question in this action, given for the value of the saw-logs seized as aforesaid in executing the writs of *feri facias* issued to enforce the payment of the said judgment. The seizure in question was not made at the instance or under the execution of the plaintiff Booth."

An issue to determine the amount due the appellant McPherson by McGuire *et al.* upon his executions having been directed; it was tried with this action.

The documentary evidence regarding the sale of the saw-mill in question is as follows:—

On the 3rd August, 1907, Allan McPherson and A. McGuire & Co. made an agreement for the purpose of winding up their dealings and transactions, they having been engaged in the buying and selling of timber limits and logs, and the manufacture and sale of lumber under certain agreements.

This agreement dealt with the various timber limits, and provided what should be done with them or with the shares of the parties therein, in each case. Clause 10 is as follows: "A. McGuire & Co. agree to buy the McLean saw-mill and machinery, as it stands to-day, at the sum of \$7,500, to be delivered in as good state and condition as at the present, at the end of the present season of sawing." Then follows clause 11: "All the said accounts to be taken together as a series of dealings and transactions between the parties, and the final balances adjusted and settled in accordance therewith."

On the 8th April, 1908, another agreement was come to between the same parties and Andrew Devine, in which it is stated as follows:—

Clause 2: "The accounts of the dealings and transactions under the said agreement of 3rd August, 1907, have been examined and settled, and the balance payable by A. McGuire & Co. to Allan McPherson has been fixed at the sum of \$1,812.81, over and above and in addition to the price of the saw-mill hereinafter mentioned."

Clause 4: "And A. McGuire & Co. and Andrew Devine, for

themselves and each of them for herself and himself jointly and severally, covenant, promise, and agree with Allan McPherson, his executors, administrators, and assigns: (2) To pay the sum of \$7,500, the price of the saw-mill, in three equal annual instalments of \$2,500 each, with interest at 6 per cent. per annum on unpaid principal money, payable with each instalment. The first instalment and interest to be paid in one year from this date, and the said principal money and interest to be secured by a mortgage in the usual form, at the time of the delivery of the saw-mill."

Clause 6: "And it is understood and agreed that the saw-mill shall be insured and kept insured by A. McGuire & Co. and Andrew Devine against loss by fire after the expiration of the present policy for the benefit and protection of Allan McPherson, to an amount equal to the balance of the price payable to him from time to time; and A. McGuire & Co. and Andrew Devine shall pay the premiums and assign the policy and do all such acts and things as may be necessary to give to Allan McPherson the usual protection of a fire insurance policy. Allan McPherson, having insured the mill since the date of the agreement of 3rd August, 1907, and waived any claim for premiums therefor, is to be allowed to have the use of the saw-mill during the present season, and shall keep it in proper repair; such use to cease on 30 days' notice after the 1st day of June next."

The meaning of the word "saw-mill," though probably not ambiguous in itself, is open to explanation if it is doubtful whether it was intended to include the site. In consequence, evidence at the trial was admitted on the subject, and on the question of whether there was an agreement to remove it. McGuire says: "Simply purchased the McLean mill; that was all that was mentioned; of course to operate the mill you would have to have land with it there. . . . The operating of the mill, we discussed about moving it, but I abandoned that very shortly because of the freight rates charged on the road (the Temiskaming and Ontario Railway), and it would not pay to move it up there. . . . There was no discussion about the land, my Lord—it was simply the mill—and the land was not discussed by either party that I remember of; but to manufac-

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ture lumber there, you could not manufacture it without the land. . . . Q. When you started, at the beginning you thought of moving the mill up to the limits? A. That was suggested. Q. Did you not think of doing it seriously? A. Yes, I did; that is, if the mill was left in the agreement. . . . Q. Was there any arrangement between you and McPherson; was there any bargain with you that you should move the mill or he should move it off the site it was on? A. No, there was not anything like that, that ever I remember of; there was not much said about moving the mill; it was simply, I bought the mill, and we thought it might be better to move it up there. It was not long until we found out it would not pay to move it."

McPherson says: "The intention was to move it to cut these limits" (*i.e.*, the Bryce & Beauchamp limits, which under the agreement McGuire was acquiring) . . . "Yes, that is the idea I had . . . Yes, that is the way I understood it; it was understood at the time he was to remove it next spring. . . . It was understood he was to move it because he was getting these limits, and there was no mill up there. . . . I bought the 300 acres with it. Q. That included the mill site? A. Yes, it was on the 300 acres."

In his examination for discovery McPherson says:—

"35. Q. And judgment in that case of the Privy Council was delivered about the 1st of November, 1912? A. Yes.

"36. Q. Up to this time you had been in possession of the McLean saw-mill? A. Yes.

"37. Q. And had you been operating it? A. No, not after the term of our agreement.

"38. Q. The agreement gave you the right to operate it until the 1st day of June, 1909? A. Yes.

"39. Q. And the operation of the mill ceased at that date? A. Yes, it ceased in June, 1909.

"40. Q. And thereafter the mill was idle? A. Yes.

"41. Q. I understand that you sold the site of the mill? A. Yes.

"42. Q. When did you sell that? A. On the 23rd January, 1912. . . .

"46. Q. But you only sold the mill-site? A. No, I sold the whole 300 acres, including the mill-site.

"47. Q. For \$3,000. A. Yes.

"48. Q. And you have paid for that site? A. Yes.

"49. Q. The mill then was standing on the site after you sold the site? A. Yes.

"50. Q. What did you do with the mill? A. I left it there.

"51. Q. How long? A. I sold it again in January, 1913.

"52. Q. To whom did you sell it? A. J. M. Plaunt—he was agent for the Harris Tie and Timber Company of Ottawa. . . .

"56. Q. How much did you get for the mill? A. \$1,750.

"57. Q. And has that been paid yet? A. Yes.

"58. Q. Where did you deliver the mill to him? A. Just where it was, he took it where it was.

"61. Q. He took it away himself? A. Yes.

"62. Q. And he took away all the machinery? A. Yes.

"63. Q. And all the timber of the mill? A. Yes."

From the evidence I should infer that the mill alone, and not as well the land on which it stood, was the subject of sale. But I do not find any concluded agreement that it was to be removed, or when. The time of delivery is stated, and then postponed by the second contract. Neither party deposes to any oral bargain, but rather to intention and understanding, both indefinite. It cannot be said that the written agreement provides for severance at once nor at a later date, and but for the loose understanding it might well be that the mill and land went together.

The first agreement provides for the retention by the appellant of the mill till the end of the then sawing season, when it is to be "delivered in as good state and condition as at present." McGuire says that very shortly after the sale he abandoned the idea of moving it, and this probably accounts for the dividing of the purchase-money into three instalments, and the provision for the giving of a mortgage when the mill was "delivered," and its user meantime by the applicant.

It is argued that this agreement must be treated as the sale of a chattel; and that, as the purchaser made default while the chattel remained in the vendor's possession, the latter had a

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right to sell it and at the same time to recover the unpaid price, or damages equal to the unpaid price. On the other hand, it is contended that the transaction was in regard to an interest in land, and that the subsequent sale by the vendor of the thing sold disabled him from enforcing his judgments, on the principle recently applied in this Court in *H. H. Vivian Co. Limited v. Clergue*, 32 O.L.R. 200.

The rule allowing resale by the vendor, in case of chattels, depends upon the passing of the property to the vendee. The resale is said not to affect the contract, because it has been executed—the vendor having accepted the promise of payment in place of payment itself. Hence the resale is a tortious act, committed against the chattel of the vendee, and only gives rise to an action by him for damages.

While the subject of the sale was the mill alone, it cannot be said that, on the evidence, there is any definite time for severance other than at the end of the season, if delivery means actual removal. It does not necessarily do so. But there is certainly lacking that element in the bargain spoken of by Lord Abinger in *Rodwell v. Phillips* (1842), 9 M. & W. 501, at p. 505, namely, that the nature of the contract is such that it must be taken to have been the same as if the parties had contracted for the mill already detached.

The evidence is that this mill is a pretty large one, a stationary one, with a frame structure built solidly there with three boilers and a large engine. This is McGuire's description. The appellant describes it as larger than a portable mill, but easily moved, but he does not contradict McGuire in the details given. The user of the mill *in situ* is provided for, and was continued for a year and three quarters. It was to be kept in repair, and a mortgage, not described as a chattel mortgage, was to be given to secure the purchase-money. The mill was real estate at the time of sale, but there is nothing unusual in selling part of the real estate or an interest in it, such as the coal or minerals therein, or the surface earth, or the buildings upon the land. The agreement for sale of such an interest, which may sever it in the contemplation of the parties, or even its conveyance, does not in itself or necessarily make it a chattel. This is the effect of

Lavery v. Pursell, 39 Ch.D. 508, and *Morgan v. Russell & Sons*, [1909] 1 K.B. 357. The support to the opposite theory, drawn from the case of standing timber sold with an agreement to remove, needs to be considered.

In *Marshall v. Green*, 1 C.P.D. 35, the trees were to be taken away "as soon as possible;" and Lord Coleridge, C.J., at p. 39, in dealing with the case, says: "Where . . . the parties agree that the thing sold shall be immediately withdrawn from the land . . . the contract is for goods." Brett, J., says (p. 42): "If they are not *fructus industriales*, then the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining; then part of the subject-matter of the contract is the interest in land, and the case is within the section. But if the thing, not being *fructus industrialis*, is to be delivered immediately, whether the seller is to deliver it or the buyer is to enter and take it himself, then the buyer is to derive no benefit from the land, and consequently the contract is not for an interest in the land, but relates solely to the thing sold itself."

In the case of *Kauri Timber Co. v. Commissioner of Taxes*, [1913] A.C. 771, Lord Shaw, in dealing with the interest acquired by the Kauri company under their purchases of timber, specially emphasises the necessity of immediate severance in deciding whether the interest is real estate or chattel property. After pointing out that there was no obligation upon the company immediately to cut down and remove the timber, or to do so at any specific date, he says (p. 776): "The case is thus removed, in fact, from any analogy with decisions quoted at their Lordships' Bar, in which a sale of standing timber was coupled with the duty of its instant removal from the ground." After quoting the note in Saunders' Reports, p. 277c, he remarks (p. 779): "For the present is a broad case of the natural products of the soil in timber—a crop requiring long-continued possession of land until maturity is reached, and the contract with regard to it in the present case raises none of the difficulties springing out of a covenant for immediate severance and realisation. The judgment of Brett, J., in *Marshall v. Green* distin-

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guishes this broad case and properly accepts the note in Saunders' Reports which has just been cited."

What the learned Judge refers to is the passage quoted by him on p. 778—"but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for goods."

Having regard to the emphasis laid, in these two cases, on immediate or instant removal, it is interesting to note the various views held in this Province on the effect of a similar contract.

Blake, V.-C., and Spragge, C. in *Summers v. Cook* (1880), 28 Gr. 179, hold an agreement for the sale of standing timber to be one for an interest in the land. Blake, V.-C., comments on *Marshall v. Green*, which, he says, turned on the condition that the trees were to be got away "as soon as possible," but thought it an unfortunate exception to an intelligible rule, that the question was left to depend upon the length of time for removal, and declined to extend the exception to a case where that time was a possible eight years. Proudfoot, V.-C., dissents from this view, deducing from *Marshall v. Green* the rule that, if the trees were purchased for timber as they stood, and not with the intention of allowing them to increase in size and become more valuable, they are to be considered as chattels.

In *McGregor v. McNeil* (1882), 32 U.C.C.P. 538, Galt, J., and Wilson, C.J., thought that a contract for pine timber, to be removed inside of two years, was a sale of chattels; while Osler, J., considered it unnecessary to decide the point.

In *Johnston v. Shortreed* (1886), 12 O.R. 633, Wilson, C.J., and Armour, J., decided that a sale of trees for the purpose of being cut and removed from the land, and with a condition that they were to be removed within ten years, was a sale of chattels, but that, if the condition was not performed, they reverted in the owner of the land. O'Connor, J., did not dissent from the view that the contract was for a sale of chattel property.

In *McNeill v. Haines* (1889), 17 O.R. 479, Ferguson, J., and Boyd, C., follow *Summers v. Cook*, *supra*; the former pointing out the difficulty created by the conflicting cases I have men-

tioned. Proudfoot, J., though adhering to his former opinion expressed in that case, adds that he is now in a hopeless minority.

In *Handy v. Carruthers* (1894), 25 O.R. 279, Street, J., states the general rule to be that a contract for the sale of standing timber which is not to be severed immediately is a sale of an interest in land; and, after commenting upon the previous decisions and *Lavery v. Pursell*, 39 Ch.D. 508, holds the contract in that case (removal after three years) to be an agreement for the sale of an interest in land. He agreed with Blake, V.-C., in *Summers v. Cook*, remarking that it is difficult to see why, if a provision for the removal in two years makes the trees chattels, a condition for ten years should leave them as an interest in land.

In *Ford v. Hodgson* (1902), 3 O.L.R. 526, an agreement in writing for the sale of timber removable within three years was held to be a contract regarding an interest in land, by Falconbridge, C.J.Q.B., and by a Divisional Court consisting of Boyd, C., and Ferguson, J.

In *Beatty v. Mathewson* (1908), 40 S.C.R. 557, Idington, J., who delivered the judgment in which Girouard, J., agreed (MacLennan, J., concurring in dismissal for the reasons given by the Ontario Court of Appeal), speaks of the grant of timber trees there in question as an instrument relating to what has been held to be an interest in land; while Duff and Davies, JJ., treat it as a grant of land. In the Court below, *Mathewson v. Beatty* (1907), 15 O.L.R. 557, Meredith, J.A., who dissented, points out the fact that the trees were not bought for early removal.

It appears from these cases that the decision in *Marshall v. Green* has been considerably extended in some instances, if that case is to be treated as dependent upon immediate or instant removal, where trees are growing, or upon the process of vegetation being over. It is to be observed that in *Summers v. Cook*, *supra*, the trial Judge found that the timber was to be cut and used "as soon as possible," although the contract gave a year for removal. If the decision in *Marshall v. Green* is to be treated as it seems to have been in the *Kauri* case, there would appear to be justification for the comments upon decisions pro-

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fessing to be based on it, in some of the cases I have mentioned. I think the weight of opinion is in favour of restricting the effect of *Marshall v. Green* to cases of immediate removal; and, in view of the conflict, it is open to this Court to follow the reasoning in *Lavery v. Pursell* in preference to that in *Marshall v. Green*, if the views of Mr. Justice Chitty commend themselves to it.

The case at bar seems more nearly to resemble one of the instances put in the note to Williams' Saunders as given in *Marshall v. Green*, namely, where the subject-matter of the sale was intended to remain on the land for the advantage of the purchaser. The mill was undoubtedly to remain on the land "until the end of the present season of sawing." That was for the advantage not only of McPherson, but of McGuire as well; because, while being used meanwhile, it was to remain, if McPherson's evidence be accepted, until it was wanted for the Bryce and Beauchamp limits. But, at all events, it was to remain for a time; and, if it was McGuire's property, that was a benefit to him until he wanted to take delivery. The use of it by McPherson was by permission of McGuire, who presumably got or should have got consideration for that user in the agreement; so that the feature of immediate severance is replaced by that of retention, user by permission, and later delivery in good shape notwithstanding the sawing. The subsequent agreement emphasises in many ways this distinction. The use of the words "to be delivered in as good state and condition as at present" indicates that McGuire was to enter and inspect and remove, if indeed anything further is required to explain "delivery" than the words "as it stands to-day," which give the right of entry and inspection then, and also later, to see if the condition had been fulfilled.

In *Marshall v. Green*, the fact that the buyer derived no benefit from the land is made by Brett, J., to depend on the fact that the trees were to be removed immediately; and Grove, J., states the test as being whether there is real benefit or merely warehousing. Obviously here the mill was not warehoused—i.e., detached and stored—it was to be used for sawing, and needed the support of the land to which it remained attached.

In *Lavery v. Pursell*, the fact that the thing sold was in point of fact then realty, that the right to go in and pull down, though temporary only, was a qualified possession "of the land, tenements, and hereditaments, certainly of the house itself," and that the intention of the parties could not change the nature of the property, form the basis of the decision, and seem to me to include elements entering into this case.

It may be noted that in *Walton v. Jarvis*, 13 U.C.R. 616, Robinson, C.J., speaking for the Court, does not treat the effect of the verbal contract for the sale of the engine and boiler as making them chattels, which description he gives there only upon actual severance. I do not see that the definition in the English Sale of Goods Act, in sec. 62, helps matters. It is not in force here, and cannot change the legal nature of the thing dealt with under a contract in Ontario.

If then the property sold to McGuire is to be treated as real estate or an interest in land, the effect of the sale would be to rescind the contract, thus terminating the obligation to pay the purchase-money, and so the judgments, so far as they were recovered for the instalments of the purchase-money, cannot be enforced: *Jackson v. Scott*, 1 O.L.R. 488.

If the appellant McPherson had treated McGuire's default in payment as a repudiation of the whole contract, then he could have resold or done as he liked with the mill, and have sued McGuire for damages, which would have been the difference between the agreed price and that realised by the resale, or the value of the mill as it stood when the contract was repudiated: *Noble v. Edwardes* (1877), 5 Ch.D. 378. Instead of doing this, he held McGuire to the contract, sued for the purchase-money, and was endeavouring to enforce his judgments therefor at the time he resold the mill.

If the mill is a chattel, then it may be that the appellant McPherson could not enforce his present judgments unless he could shew that the property had passed to McGuire, and that his resale was merely a tortious act. I am not satisfied, in view of the terms of the agreements providing for delivery and for user and repairs to be done by the appellant McPherson before delivery, that the property in the mill had completely passed, but it

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is unnecessary to discuss this question, in view of the opinion I have formed as to the effect of the contract in the present case.

Upon the cross-appeal, *i.e.*, as to the additional executions, there is nothing to be added to the reasons given by the learned trial Judge for admitting them to share.

I think the plaintiffs' appeal should be dismissed with costs, and the cross-appeal with costs.

KELLY, J.:—The important point in issue in this appeal is, whether the sale of the saw-mill and machinery by the plaintiff McPherson to McGuire & Co., in respect of the recovery of a part of the sale-price of which the appellants have sought to recover on a bond given by the defendant company, was a sale of land or of an interest in land. The matter might perhaps be better stated by saying that the real question in issue is, did the appellant McPherson, by reason of his having sold the saw-mill to a third party, preclude himself from recovering the balance of the sale-price on the earlier sale made or agreed to be made to McGuire & Co.?

The difficulty which presents itself is to determine, on a proper interpretation of the documents and on the evidence of what took place, what was the real character of the sale. In a number of cases in which the question now before us, with variations in the facts, has been considered, the Courts have expressed themselves as not being satisfied with just what conditions are necessary to draw a clear distinction between what constitutes a sale of an interest in land, and what amounts to a sale of chattels or of a chattel interest.

Prior to the agreement presently mentioned, McPherson and A. McGuire & Co. had been engaged in the buying and selling of timber limits and logs, and in the manufacture and sale of timber. The inception of the transaction which gave rise to this action was on the 3rd August, 1907, when a written agreement was entered into between them dealing with many matters, the one now of importance being embodied in clause 10 as follows: "A. McGuire & Co. agree to buy the McLean saw-mill and machinery, as it stands to-day, at the sum of \$7,500, to be

delivered in as good state and condition as at the present, at the end of the present season of sawing."

The mill then stood upon lands which formed a part of a parcel comprising about 300 acres.

On the 8th April, 1908, nothing having been paid on the purchase-price, an agreement was made between these same parties and one Devine, whereby A. McGuire & Co. sold and transferred to Devine an undivided half share and interest "of the estate, right, title and interest of A. McGuire & Co. under the said agreement of 3rd August, 1907," and A. McGuire & Co. and Devine agreed with McPherson, amongst other things, "to pay the sum of \$7,500, the price of the saw-mill, in three equal annual instalments of \$2,500 each, with interest at 6 per cent. per annum on unpaid principal money, payable with each instalment. The first instalment and interest to be paid in one year from this date, and the said principal money and interest to be secured by mortgage in the usual form, at the time of the delivery of the saw-mill."

This agreement contained also this provision: "And it is understood and agreed that the saw-mill shall be insured and kept insured by A. McGuire & Co. and Andrew Devine against loss by fire after the expiration of the present policy for the benefit and protection of Allan McPherson, to an amount equal to the balance of the price payable to him from time to time; and A. McGuire & Co. and Andrew Devine shall pay the premiums and assign the policy and do all such acts and things as may be necessary to give to Allan McPherson the usual protection of a fire insurance policy. Allan McPherson, having insured the mill since the date of the agreement of 3rd August, 1907, and waived any claim for premiums therefor, is to be allowed to have the use of the saw-mill during the present season, and shall keep it in proper repair; such use to cease on 30 days' notice after the 1st day of June next."

The mill and machinery remained unmoved until January, 1913. In the meantime, McPherson had obtained two separate judgments for the first and second instalments of purchase-money respectively—the first judgment including also some other moneys—and attempted to realise by execution, by virtue

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of which the sheriff seized a quantity of saw-logs. These having been claimed by a third party, an interpleader issue followed, in which the bond of the respondents now sought to be realised upon was given as security. The interpleader issue was finally disposed of by the Privy Council, in favour of the present appellants, on the 19th November, 1912 (*McPherson v. Temiskaming Lumber Co.*, [1913] A.C. 145).

In January, 1912, McPherson sold the 300 acres, including the mill-site, but not the mill itself, nor the machinery. The third instalment of purchase-money matured, and about \$1,200 had become due for premiums on insurance on the mill and machinery; McPherson, in January, 1913, sold the mill and machinery for \$1,750.

According to McPherson's evidence, the mill was a stationary one: "It could be moved, too, very easily, but it was more of a stationary mill;" "larger than the ordinary mill." He says he continued in possession of it up to the time of the judgment of the Privy Council (November, 1912), and that he operated it until June, 1909, after which it was idle.

Cornelius McGuire, who acted for McGuire & Co., says it was a "frame, stationary mill, frame structure," which had been there for possibly three or four or five years, "a pretty large mill, frame structure, built solidly there," and "I think that there were three boilers in the mill and a large engine;" that he simply purchased the "Maclean mill," that was all that was mentioned; "of course, to operate the mill you would have to have land with it there." He adds that "we discussed about moving it," "but I abandoned that very shortly because the freight rates changed on the road, and it would not pay to move it up there" (referring to timber limits which he had acquired about 100 miles distant), "and then we thought we would bring the logs down, and he suggested and wanted me to bring the logs down, and manufacture them there." In answer to a question as to what use of the yard he had, or had he the right to use it, he said: "I had the right to it to manufacture anything I wanted there, and he says, 'Why not bring the logs down and manufacture them here?'" This evidently refers to a time subsequent to the making of the original agree-

ment for sale. He also says that McPherson never told him he should move it.

As to the moving, and the purpose for which the mill and machinery were bought, McPherson says: "The intention was to move it to cut these limits" (the limits above referred to); but at no place does he say that there was an agreement to that effect, or that there was anything more than mere intention. Later on, when referring to the intention to remove, he adds, "that is the way he understood it;" "it was understood at the time that he" (McGuire) "was to remove it next spring;" while McGuire says: "I thought when I got it I could go on and use it if I wanted it; there was nothing there to use it on, and he" (McPherson) "kept on using it himself."

The learned trial Judge thought that it was clear that the mill was purchased with the idea of removing it from the property and taking it to the timber limits, which were sold contemporaneously, and that it was not the intention of the parties that any land should pass. Admitting that for argument's sake to be so, there are still other considerations to be weighed in determining the matter. The line of demarcation between the two classes of cases is, as has been said, not easily drawn, particularly when there is the apparent vagueness of expression which characterised the dealings between these parties in important details. Coleridge, C.J., in *Marshall v. Green*, 1 C.P.D. 35, said (at p. 38) that the words used in the 4th section of the Statute of Frauds in reference to contracts for sale of lands, tenements, or hereditaments, or any interest in or concerning them, have given rise to a great deal of discussion, and that very high authorities have said that it is impossible to reconcile all the decisions on the subject; and he added that he despaired of laying down any rule which could stand the test of every conceivable case.

Most of the leading cases bearing upon the question treat of sales of trees or crops growing on the land, and in such cases it seems to have been recognised that what was stated by Sir E. V. Williams in his note to *Duppa v. Mayo*, at p. 395 of his notes to Saunders' Reports, has application. After stating there that the doctrine on the subject had been materially quali-

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fied, he proceeds to say that in respect to *fructus industriales* the true question is, whether, in order to effectuate the intention of the parties, it be necessary to give the buyer an interest in the land, or whether an easement of the right to enter the land for the purpose of harvesting and carrying them away is all that was intended to be granted to the buyer. He distinguishes such cases from those that treat of the natural product of the land, such as grass uncut, but which the purchaser is to cut, or growing underwood to be cut by the purchaser—not distinguishable from the land itself, in legal contemplation, until actual severance—in which case, he says, the purchaser takes an exclusive interest in the land before severance, and therefore the sale is of an interest in the land under the statute. But where the owner of trees growing on his land agrees while they are standing to sell the timber, to be cut by the vendor, at so much per foot, or even when the contract is for the sale of trees with a specific liberty to the purchaser to enter the land and cut them, the sale is of goods and not an interest in land.

In *Marshall v. Green*, *supra*, Brett, J., when referring to things not *fructus industriales*, expressed the view that the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining, in which case part of the subject-matter of the contract is the interest in land; but that, if the thing sold, not being *fructus industrialis*, is to be delivered immediately, whether the seller is to deliver it or the buyer is to enter and take it himself, then the buyer is to derive no benefit from the land, and consequently the contract is not for an interest in the land, but relates solely to the thing sold itself. The importance which he attaches to immediate delivery emphasises the distinction between the two cases.

The facts in evidence in the present case more nearly approach those in *Lavery v. Pursell*, 39 Ch.D. 508, on which the learned trial Judge based his conclusions. There a contract was made on the 11th November, 1886, for the sale of the building material of a house—possession of the premises to be given the purchaser for the purpose only of taking down and removing

the material—with a condition that the materials were to be taken down and cleared off the ground “on or before the 11th of January next, after which date any materials then not cleared will be deemed a trespass and become forfeited, and the purchaser’s right of access to the ground shall absolutely cease”—the pulling down and removal to be done under the direction of the vendor’s architects; the vendor reserving the right of access to the premises for himself and his surveyors and workmen. It was held by Chitty, J., that that constituted a contract for sale of an interest in or concerning the land. In arriving at his conclusion, he had before him and discussed fully the effect of the judgment in *Marshall v. Green*, and drew a clear distinction between the two classes of cases. He, too, attached importance to the question of possession, and as to whether, in the case of trees, they were to be severed as soon as possible; and he treated the house in the case before him as being a hereditament.

All these elements are material to be considered, and due weight should be given them in determining the present case.

The transaction starts out with an agreement for sale of a something which at least was an interest in land; an ordinary conveyance of the land on which it stood, without any special reference to the mill itself, would undoubtedly have passed the title in it to the grantee as attached to or forming part of the free hold. Something positive was, therefore, necessary to change its status and deprive it of the character of an interest in land, and make it a chattel or goods; and this would involve some act as to the effect of which there should be no doubt. Can it be said that what happened effected this material change? There was no express agreement for the time of severance or removal, if, indeed, such severance or removal was even contemplated; both the agreement of the 3rd August, 1907, and that of the 8th April, 1908, speak of delivery, but when or by what means they say not. By the earlier agreement the delivery was to be “at the end of the present season of sawing,” but no time fixed. The later agreement mentions delivery only in saying that the principal and interest (the purchase-price) are “to be secured by a mortgage” (not expressly a chattel mortgage), “in the

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usual form, at the time of the delivery of the saw-mill;" and again no time for delivery is otherwise fixed. Nowhere is possession mentioned. Whatever the meaning of either of the contracting parties may have been as to removal, some change of intention evidently took place, and we find the vendor in charge of and using the mill on its original site down to June, 1909, and holding possession without interruption from the time of the contract until November, 1912, and, indeed, until he sold it in January, 1913—the other parties to the agreement not having had possession or use of it in the meantime.

I cannot reach the conclusion that the thing sold changes its character as an interest in land to that of a chattel by the mere fact of an agreement being made such as we have here, when delivery is mentioned only in an indefinite way, when there is an absence of any provision for possession or use (other than that which it was agreed the vendor should have), or for removal, or that it was the duty of either party to take down, sever, or remove, and no time being definitely fixed for any of these things being done.

Treating what was the subject of the sale as an interest in land, as I feel bound to treat it, the vendor has, by selling, precluded himself from enforcing his judgment for the balance of the purchase-money: *Cameron v. Bradbury*, 9 Gr. 67; *Gibbons v. Cozens*, 29 O.R. 356; *H. H. Vivian Co. Limited v. Clergue*, 32 O.L.R. 200.

In the view that I have taken of the whole matter, both the appeal and the cross-appeal should be dismissed, with costs in each case.

In the result, both appeals dismissed with costs.

[APPELLATE DIVISION.]

HULL V. SENECA SUPERIOR SILVER MINES LIMITED.

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April 19.

Mines and Minerals—Statutory Obligations of Mine-owners—Mining Act of Ontario, R.S.O. 1914, ch. 32, sec. 164, rules 45, 98—Breach of—Death of Miner—Master and Servant—Negligence—Contributory Negligence—Evidence—Findings of Jury—Cause of Death—Employment of Incompetent Hoist-man—Defective System.

Section 64, rule 45, of the Mining Act of Ontario, R.S.O. 1914, ch. 32, prescribes the code of signals for raising or lowering a cage in the shaft of a mine, and rule 98 provides that the owner of a mine shall enforce and observe such care and precaution for the avoidance of accident or injury to any person in or about the mine as the particular circumstances of the case require, and that the machinery, plant, appliances, and equipment, and the manner of carrying on operations, shall always, and according to the particular circumstances of the case, conform to the strictest considerations of safety.

H. was employed on the top deck of the defendants' mine, at night, in receiving and taking cars loaded with ore from the cage of a hoist, when it arrived from below, and putting empty cars into the hoist, signals being given by him to the hoist-man below. H. was the only person upon the top deck; he was inexperienced; the work was difficult; and the deck was dimly-lighted. A car with H.'s dead body jammed between it and the side of the shaft was found about 60 feet below the top deck; nobody saw him fall. In an action by his widow to recover damages for his death, the jury found negligence of the defendants causing the death, and negatived contributory negligence; the negligence found consisted in the defendants not having an experienced man to shew H. the regular way of performing his duty, for at least the first shift; and that the defendants should have had an experienced man with D., the hoist-man, till he well understood the hoist, "which we consider he did not."

A judgment for the plaintiff entered upon these findings by LENNOX, J., at the trial, was affirmed, it being *held* (RIDDELL, J., dissenting), that the statutory obligations of the defendants had not been discharged, and that they could not escape liability on the ground that D. was a fellow-servant of H.

Per LATCHFORD, J.—The negligence was really that of the employers, in omitting to provide a proper system by which the dangerous character of the employment might be lessened, and in putting in charge of a dangerous machine, and keeping there for part of the day and the whole of the night, without supervision or instruction, a man incompetent to manage the hoist.

Choate v. Ontario Rolling Mill Co. Limited (1900), 27 A.R. 155. and *Jones v. Canadian Pacific R.W. Co.* (1913), 30 O.L.R. 331, applied.

Per KELLY, J.—Failure of a mine-owner to maintain the mine in a condition suitable for carrying on the work with reasonable safety is followed by liability, even though the act which caused the injury may have been attributable to neglect of duty of a fellow-employee, and even though the owner employed competent officials for the superintendence of the mine, and required the statutory directions to be observed. There was evidence before the jury from which they could reasonably have drawn the conclusion at which they arrived, and the case could not properly have been withdrawn from them.

Grant v. Acadia Coal Co. (1902), 32 S.C.R. 427, and *Grand Trunk R.W. Co. v. Griffith* (1911), 45 S.C.R. 380, applied.

Per RIDDELL, J.—The Legislature, by the very general language employed, could not have intended to render the defendants liable for an accident in the circumstances disclosed. To fix the defendants with liability, something in the nature of definite negligence resulting in an accident must be brought home to them.

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ACTION by the widow of Regis Hull, under the Fatal Accidents Act, to recover damages for his death while working for the defendants in their mine, by reason of the negligence of the defendants, as the plaintiff alleged.

November 11 and 12, 1914. The action was tried before LENNOX, J., and a jury, at Haileybury.

A. G. Slaght, for the plaintiff.

H. E. Rose, K.C., for the defendants.

December 1, 1914. LENNOX, J.:—The questions left to the jury were answered in favour of the plaintiff.

I think there was evidence to go to the jury as to how Regis Hull came to his death. I charged the jury very carefully upon this point. It was not objected, when the jury brought in their findings, that question 5, or any question, was not answered, or was not fully and properly answered. It was peculiarly a case for a jury. I think that, upon the answers, the plaintiff is entitled to judgment. Counsel agreed that the amount proper to be assessed under the statute is \$2,100, and the jury were directed to assess damages only at common law. They fixed the damages at the same sum.

There will be judgment for the plaintiff for \$2,100 with costs.

The defendants appealed from the judgment of LENNOX, J.

March 2. The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

H. E. Rose, K.C., and *R. S. Robertson*, for the appellants, contended that the negligence found by the jury was not the proximate cause of the death, referring to *Sault Ste. Marie Pulp and Paper Co. v. Myers* (1902), 33 S.C.R. 23; *Hamilton Bridge Co. v. O'Connor* (1895), 24 S.C.R. 598; *Woods v. Toronto Bolt and Forging Co.* (1905), 11 O.L.R. 216; *Young v. Hoffman Manufacturing Co. Limited*, [1907] 2 K.B. 646.

A. G. Slaght, for the plaintiff, respondent, argued that rules 44, 46, and 98 of sec. 164 of the Mining Act of Ontario, R.S.O.

1914, ch. 32, were conclusive in the plaintiff's favour. On the question of the care exercised by the deceased, see *Jones v. Canadian Pacific R.W. Co.* (1913), 30 O.L.R. 331. The deceased should have been instructed how to do his work and warned of the danger. There was negligence on the part of some one who had the superintendence: see the Workmen's Compensation for Injuries Act, R.S.O. 1914, ch. 146, sec. 3 (b); *Choate v. Ontario Rolling Mill Co. Limited* (1900), 27 A.R. 155; *Canadian Northern R.W. Co. v. Anderson* (1911), 45 S.C.R. 355; *Jones v. Canadian Pacific R.W. Co.*, *supra*, at pp. 348, 349; *Hamilton Bridge Co. v. O'Connor*, *supra*, at p. 602; *Danis v. Hudson Bay Mines Limited* (1914), 32 O.L.R. 335; *Lawson v. Packard Electric Co.* (1907), 11 O.W.R. 72, at p. 75.

Rose, in reply, discussed the requirements of the rules under sec. 164 of the Mining Act, as to signals. As to the right of the appellate Court to deal with the case on the evidence, he referred to *Canty v. Canadian Pacific R.W. Co.* (1910), 1 O.W.N. 661, and *Beal v. Michigan Central R.R. Co.* (1909), 19 O.L.R. 502. *Jones v. Canadian Pacific R.W. Co.* is distinguishable on the facts.

April 19. LATCHFORD, J.:—On the night of the accident, the plaintiff's husband was working out his first shift on the top deck of the shaft-house at the defendants' mine near Cobalt. There, at an elevation of 40 feet above the natural surface of the ground, he was performing alone the triple functions of deck-man, cage-tender, and trammer—too much work, according to one of the witnesses, for one man to do. Every three or four minutes, the cage was hoisted to the dimly-lighted deck, with a ton-laden car of rock or ore. Hull had to lift the gate at the shaft-head, see that the cage was raised a few inches above a point where the two steel bars called "chairs" could be thrown in by a lever to intercept the descent of the cage, place the chairs in position, signal for the cage to be lowered upon the chairs, align the rails outside the cage with the rails within it, on which the loaded car rested, pull that car out of the cage and along the rails past a switch, where stood a car which he had emptied, push the empty car into the cage still resting on

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the chairs, signal to lower the cage to the working level, pull the lever withdrawing the chairs, drop the gate at the shaft-head, return to the laden car and push it to the proper bin if it contained ore, or out 100 or 150 feet along the rails if it contained "muck," dump the car, and then return with it to find the cage raised to the deck once more with a loaded car, when, *ad capo*, his round of duties had to be quickly repeated.

He had so worked alone from midnight until the time of the accident—about 2.30 a.m.; but, from 7 or 7.30 on the previous evening until midnight, a man named Leclair was with him "to shew him what to do." There is no evidence that Leclair—a labourer of the same class as Hull, and receiving the same wages—gave any instructions whatever to Hull. Certainly none were given by the mine captain, Dunnigan, or by any other person in authority.

The cage was raised and lowered by a cable passing over a sheave near the roof of the shaft-head, and thence to a hoisting engine in an adjacent building. The hoist, as it is called in the evidence, was in charge of one Davis, who had been at work, except for a brief interval, from 1 p.m. of the previous day. He was on his second shift on his first day, but had worked in a similar capacity for the defendants on smaller hoists, and was considered by Dunnigan, the shift-boss, to be a good hoist-man.

After the accident, the cage was found suspended with its floor 4 feet 10 inches above the level of the top deck—an unnecessary and dangerous position, according to the witness Enright, who was asked (evidence, pp. 18, 33): "What would you expect to happen if the hoist-man put it (the cage) up that far in that room, right as it was? A. I would not expect anything only to fall down the shaft."

Hull did fall down the shaft. No eye witnessed his fall. A car, with Hull's body jammed between it and the side of the shaft, was found about 60 feet below the top deck. There is not the slightest foundation for the suggestion made by the defendants that the car which fell with Hull was not an empty car. Had it been full, Murphy and the men working below with him would have had reason to remember the circum-

stances. Moreover, it appears from Davis's evidence that he had hoisted the cage from below—laden, of course, with a car of ore or rock—to above the deck level, and then, as he says, upon signal from Hull, had let it back on the chairs, where it rested for a time. It would then be Hull's duty to take out the laden car and replace it with an emptied one. During both operations, the gate at the shaft-head would necessarily be open, as the outer gate of an ordinary passenger elevator is necessarily open during exit or entrance. I mention this because of the argument addressed to the Court that, owing to the protection afforded by the gate, Hull must have put himself in a position of danger. It was manifestly impossible, had the floor of the cage been at the deck level, for Hull to have fallen down the shaft.

The story told by Davis is, that he was given a signal to raise the cage. He "eased" it off the chairs, that they might be withdrawn by Hull, as was usual. Then, intending that the cage should fall to the mining level, he let it drop, but it was stopped by the chairs, which had not been moved. Afterwards, he was given another signal to raise the cage, and again "eased" it 5 or 6 inches. Then again one bell—the proper signal to raise—was given him, and he went on hoisting the cage until he thought it was getting close to the roof, when he stopped the hoist without further signal. The cage remained in the same position until after the accident, at a height sufficient to permit the empty car to pass under it. Hull, in the ordinary course of his duty, would push—not pull—the car into the cage if on a level with the deck. After the accident, the chairs were "out," that is, they were not in position to intercept the cage. They had either been pushed out by the falling car or thrown out in the usual way by Hull. There is no finding by the jury on the point, or as to how the accident happened.

The jury find that there was no negligence on Hull's part, thus negating the contentions of the defence as to carelessness or suicide. How the accident happened is obvious. In the interval between Hull's removal of a loaded car from the hoisted cage and his return with an empty one, the cage was hoisted without his knowledge, and he shoved the empty car into the

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opening, not clearly discernible in the dim light, where he had left the cage, and still expected it to be, and was dragged down to his death.

As against the defendants, two grounds of negligence causing the accident are found: not having an experienced man to shew Hull the regular way of performing his duty; and not leaving an experienced man with Davis until Davis well understood the hoist, which, in the opinion of the jury, he did not understand.

It may be doubtful whether the finding that the absence of instruction contributed to the accident is warranted by the evidence. Much stronger inferences against the defendants were, I think, open to the jury, upon the facts established before them. However this may be, the second finding of negligence is, in my opinion, of itself sufficient to support the judgment appealed from.

Mining is dangerous work. There was danger on the top deck, as well as down in the workings, though doubtless, as the mine captain says, there was greater danger below. There is a necessity for much greater care than mining companies, in their anxiety to win ore as cheaply as possible and increase either their profits or the market value of their shares, would ordinarily exercise without compulsion. Hence the obligations imposed by statute in all mining countries. The Mining Act of Ontario, R.S.O. 1914, ch. 32, sec. 164, rule 45, prescribes the code of signals for raising or lowering a cage, and, by rule 98, requires, *inter alia*, that "the manner of carrying on operations shall always, and according to the particular circumstances of the case, conform to the strictest considerations of safety."

Having regard to the finding that there was no contributory negligence, the immediate cause of the accident was some negligence on the part of the hoist-man, Davis. There is evidence that Davis was incompetent. Davis and Dunnigan, on one hand, and Enright, on the other, are in conflict as to the signals employed at the mine when the cage was to be lowered from the top deck. Enright says that the signal in use while he worked on the deck was two bells. Dunnigan and Davis say that the statutory signals were used—one bell to lift the case

off the chairs, then two to let it drop. The findings, such as they are, seem to me of necessity to imply condemnation of the system in use—that the manner of carrying on operations according to the particular circumstances, that is, the novel, onerous, and dangerous work the deceased was performing, uninstructed, and the inexperience and incompetence of Davis, subject to no proper supervision, did not conform, as the statute required them to conform, to the strictest considerations of safety.

Such being the statutory obligation cast upon the defendants, and not discharged, they cannot escape liability on the plea that Davis was a fellow-servant of Hull. As in *Choate v. Ontario Rolling Mill Co. Limited*, 27 A.R. 155, the negligence was really that of the employers, in omitting to provide a proper system by which the dangerous character of the employment might be lessened, and in putting in charge of a dangerous machine, and keeping there for part of the day and the whole of the night, without supervision and instruction, a man incompetent to manage the hoist. They were thus, like the defendants in *Jones v. Canadian Pacific R.W. Co.*, 30 O.L.R. 331, 349, “either the sole effective cause of the accident or a cause materially contributing to it.”

I think the appeal should be dismissed with costs.

FALCONBRIDGE, C.J.K.B.:—I agree.

KELLY, J.:—The plaintiff is the widow of Regis Hull, who met his death on the 4th April, 1914, while in the employ of the defendants at their mine in the township of Coleman. She sues not only for her own benefit, but also on behalf of her three infant children, the eldest of whom was about 4 years of age at the time of her husband's death.

The deceased commenced to work for the defendants at 7 o'clock on the evening of the 3rd April. He was employed at the top of a shaft through which cars of ore, earth, or rock were hoisted in a cage from the bottom of the mine; the deck or place on which he was working was about 40 or 42 feet above the ground level, and the shaft was so built as to permit of the cage being elevated to a distance of about 8 feet above

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the deck. The process of hoisting was, that a small car containing the material, and weighing together about a ton, was placed in the cage at the bottom of the mine, the cage being then hoisted in the shaft until its floor reached the level of the deck on which the deceased was working. On reaching that level, contrivances known as "chairs" were, by means of a lever, made to project beneath the cage so as to hold it in place while the car was being run from the cage on to the deck. The opening of the shaft to the deck was protected by a gate which, on the arrival of the cage at the deck level, was raised so as to permit of the car being taken out. It was the duty of the deceased, when the cage arrived at the deck level, to operate the lever drawing the chairs beneath the cage, open the gate, run the car from the cage on to the deck for a distance of several feet, run an empty car into the cage, and signal to the person operating the engine in the hoist-room to lower the cage, first withdrawing the chairs from beneath the cage. His duties then required him to run the loaded car, if it contained earth, to the dump, a distance of about 100 feet, the shift-boss says (another witness puts it at about 150 feet), from the shaft, but, if loaded with rock, then to the ore-bins close to the shaft. The deck and the entrance to the shaft were lighted by one electric lamp of not more than 16 candle power.

The deceased worked from 7 p.m. until midnight; and was then off duty for about an hour, returning at about 1 o'clock; and at about 2.30 a.m. his dead body and a car were found wedged in the shaft at a point about 16 feet below the ground-level.

He had been working alone; no person was within sight of him, and no one has been able to say just how he came to be in the shaft. On an examination made soon after the discovery of his dead body, the cage was found stationary at 4 feet and 10 inches above the deck—the gate leading from the deck into the shaft being raised to the same height, and the chairs being out of use.

The evidence shews that at times the cage with a loaded car thereon arrived at the deck-level at a rate of once in three minutes. No one was assigned to help the deceased in the perform-

ance of his many duties, but there is some evidence, to which I shall refer later, of another man having been sent to instruct him in the earlier hours of his night's work.

In answer to questions submitted, the jury found negligence by the defendants, causing the death, and negatived contributory negligence. The defendants' negligence found by the jury, in answer to the second question, consisted in their not having an experienced man to shew Hull the regular way of performing his duty, for at least the first shift; and, secondly, that the defendants should have had an experienced man with Davis till he well understood the hoist, "which we consider he did not." Davis was the man in charge of operating the engine which raised and lowered the cage. His position in the hoist-house was such that he could not see the cage in the shaft, or Hull's movements; he worked the engine in response to signals. The signals from the deck where the deceased was working were to be given by him. This further question was submitted: "How did Regis Hull come to his death?" To which was given the same answer as to the second question. The jury then added that they disposed of Davis's evidence. On their being asked by the learned trial Judge what they meant by "disposed," the following explanation was given:—

"The foreman: We consider, your Lordship, that the evidence that he gave did not appear to be satisfactory somehow. We could not get to the point as to how he could get a bell from Mr. Hull, as he was busy going on with his work.

"His Lordship: Do you mean by that that you do not give full credence to his evidence?

"The foreman: Yes, sir.

"His Lordship: And is that what you all mean, that you do not give full credence to his evidence?

"The foreman: Yes, sir.

"His Lordship: We will leave it that way.

"Mr. Slaght: Do all the jury assent to that?

"His Lordship: Do you all assent to my interpretation of that?

"The foreman: Yes, sir."

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The provisions of the Mining Act, R.S.O. 1914, ch. 32, are invoked by the plaintiff.

Rule 44 of sec. 164 requires that every working shaft which exceeds 50 feet in depth, unless otherwise permitted in writing by the Inspector, shall be provided with some suitable means of communicating by distinct and definite signals from the bottom of the shaft and from every level for the time being in work between the surface and the bottom of the shaft, to the hoist-room.

By rule 45, a code of signals is prescribed.

Rule 46 is as follows: "No person but the cage-tender shall ring the signal-bell, and the signal to move the cage, skip or bucket shall be given only when the same is at the level from which the signal is to be given."

Section 164 aims at ensuring a very high degree of safety for those engaged in operating mines. Many requirements to that end are therein specifically imposed, following which is rule 98, in these general terms: "There shall always be enforced and observed by the owner and the agent of a mine, and by every manager, superintendent, contractor, captain, foreman, workman and other person engaged in or about the mine, such care and precaution for the avoidance of accident or injury to any person in or about the mine as the particular circumstances of the case require; and the machinery, plant, appliances and equipment and the manner of carrying on operations shall always, and according to the particular circumstances of the case, conform to the strictest considerations of safety."

The deceased was not familiar with the work he started in to perform; the operations which he was engaged in were by no means free from danger, and the danger incident to the work was increased by the condition of dim lighting, and the necessity of activity in handling the large number of cars carried up by the cage, which required his prompt attention on their arrival at the deck. All these conditions made it the more necessary that he, an untried man, new to the work and unaccustomed to the surroundings in which he was placed, should have been so instructed as to reduce to a minimum the danger inherent in that employment. There is evidence of something having been done

in the way of instructing him. Dunnigan, the shift-boss on duty that night, says he had general orders to instruct any one who needed instruction, and that he sent a man, LeClair, from 7 p.m. to 12, "to shew Hull what to do." LeClair was in the same grade of employment and earning the same wages as Hull. His evidence, had it been procured, might have thrown some additional light on what happened. He was not, however, called as a witness; the defendants offered no evidence; and the jury were left to draw what inference they thought proper from the evidence submitted for the plaintiff; and, in arriving at whether there was proper or sufficient instruction, they were entitled to give consideration to the inefficient lighting of the deck and the other conditions under which Hull's many duties had to be performed.

The jury believed that Davis, who operated the hoist, did not properly understand it, and that his efficiency would have been increased had he been further instructed. The evidence as to his understanding of and response to the signals was not altogether satisfactory. He had been on duty almost continuously from 1 o'clock in the previous afternoon. His version of what took place is that, in response to signals, he raised the cage a few inches off the chairs to enable them to be withdrawn, and then lowered the cage, which, however, again rested on the chairs; following which, two further signals having been received, he raised the cage slowly until he thought it was close to the shaft-wheel—the position in which he found it after the accident, and which, another witness, Enright, says, would be dangerous to a man handling the car. Enright performed in the day-time the same duties as the deceased was engaged in on the night of the accident, and spoke with a knowledge so acquired. In answer to a question suggested by the learned trial Judge, he said that, the hoist being up to that height, he "would not expect anything to happen, only to fall down the shaft." But the jury were not satisfied with Davis's evidence.

It is argued that, no one having seen how the accident happened, it was not open to the jury to find as they did; that, on the evidence, the death could as readily be attributed to mere accident, or, for that matter, that it might have been the result

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of a suicidal act. The jury, however, have expressly negatived contributory negligence. There is no evidence that there was any interruption in Hull's work down to the time of the accident; the finding of his dead body, jammed with the car against the wall of the shaft, indicates that he and the car went down together, the gate into the shaft being open, and the cage being in a position (4 feet and 10 inches above the deck) which permitted of his entering the shaft, with the car—it may well be assumed in the course of his duty—and thus falling to his death. It is not an unreasonable assumption that he expected the cage to be in its accustomed place, or that in the dimly-lighted surroundings, with his attention directed to his work, he could not or did not observe the danger which resulted so fatally. The defendants' obligation to conform to the strictest considerations of safety can hardly be said to have been fulfilled towards an employee working under the conditions in which the deceased was placed. The system provided can, without distorting the evidence, be said to have been devised rather with regard to economy in its operation than to that strict consideration of safety required by the statute. Something was said in evidence of Davis's lack of knowledge of the signals, and of the interpretation he put upon them in regard to what was proper when about to lower the cage. The jury may well have inferred that further instructions both to Hull and Davis would have been conducive to ensuring the degree of safety the statute contemplated.

If what is laid down in *Grant v. Acadia Coal Co.* (1902), 32 S.C.R. 427, is to be followed, failure of a company to maintain the mine in a condition suitable for carrying on the work with reasonable safety is followed by liability, even though the act which caused the injury may have been attributable to neglect of duty of a fellow-employee, and even though the defendant company employed competent officials for the superintendence of their mine, and required the statutory directions to be observed.

The effect of the statutory duties imposed upon a mine-owner is also dealt with in *Danis v. Hudson Bay Mines Limited*, 32 O.L.R. 335.

In *Britannic Merthyr Coal Co. Limited v. David*, [1910] A.C. 74, it was held that upon the question whether the mine-authorities had done their duty in taking proper care of the safety of the miners the burden of proof did not lie upon the plaintiff.

But the argument goes so far as to contend that, admitting all this to be so, the case is still wanting in evidence properly submissible to the jury connecting Hull's death with any act or omission of the defendants. Slight though it may be, there is still some evidence of Davis's failure fully to understand the signals, and this, with the evidence as to his response to the signals at the time the cage was hoisted to the top of the shaft, was quite proper for the jury's consideration. There being a finding against contributory negligence, it was open to the jury to reach the conclusion on the evidence before them that Hull's death was not accidental, but was attributable to the conditions of employment in which the defendants placed him.

The case is easily brought within the conclusion definitely stated in *Grand Trunk R.W. Co. v. Griffith* (1911), 45 S.C.R. 380, where Duff, J. (at pp. 386, 387), lays it down that a plaintiff is entitled to succeed if he convinces the jury, on facts reasonably leading to that conclusion, that the defendants' negligence has materially contributed to the mishap, and if at the same time the jury may reasonably find, and do find, that the defendants have failed to discharge the onus placed upon them of shewing that there has been contributory negligence; and where he quotes from *Richard Evans & Co. Limited v. Astley*, [1911] A.C. 674, at p. 678: "It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a Court to act upon. Any conclusion short of certainty may be mis-called conjecture or surmise, but Courts, like individuals, habitually act upon a balance of probabilities."

I am of opinion that there was evidence before the jury

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from which they could have reasonably drawn the conclusion at which they arrived; that the case could not properly have been withdrawn from them; and that, therefore, the appeal should be dismissed with costs.

RIDDELL, J.:—In this case I find myself unable to see eye to eye with my learned brethren. I cannot convince myself that the Legislature, by the very general language employed, intended to render the defendants liable for an accident under such circumstances as are disclosed in the present case. It seems to me that something in the nature of definite negligence resulting in an accident must be brought home to the defendants; and that we are not to indulge in conjecture in such more than in other cases.

I do not think it at all helpful to write an extended judgment: the facts are not complicated; and an appellate tribunal is in as good a position as we to weigh them. Nor is the same set of facts likely to recur; and each case must be decided on its own facts.

Appeal dismissed; RIDDELL, J., dissenting.

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April 19.

Company—Unsatisfied Judgment against—Action against Directors by Assignee of Claims for Wages of Servants—Companies Act, R.S.O. 1914, ch. 178, sec. 98—Agreement between Assignee and Company—Novation.

The plaintiff kept a store near the mine of an incorporated company. Pursuant to an arrangement made between him and the company, the men employed by the company who bought goods from the plaintiff had the price of the goods charged against their wages. The purchasers initialled the vouchers, which were sent to the company; when the pay-cheques were drawn, a separate cheque was made out for each workman's store-bill, payable to the workman; the men then endorsed these cheques, and they were retained by the company. An adjustment was made monthly between the plaintiff and the company; he was given credit for the amount of these cheques so held and for any goods he had sold to the company; he was charged with the rent of his store, which was owned by the company, and for anything else which he owed to the company; and was then given a cheque for his net balance. The plaintiff recovered judgment against the company for the amount of a claim made up of balances due for wages, represented by the original cheques in favour of the men, which had never been handed over to the plaintiff. Execution having been issued and returned unsatisfied, this action was brought against directors of the company to enforce a claim under sec. 98 of the Companies Act, R.S.O. 1914, ch. 178:—

Held, that the money became payable to the plaintiff by virtue of his direct contract with the company when the adjustment took place and he accepted the cheque. There was then a novation, and under this new contract the plaintiff became a creditor of the company in respect of the cheques given to him, and the demands ceased to be demands for wages within the meaning of the statute.

Lee v. Friedman (1909), 20 O.L.R. 49, and *Olson v. Machin* (1912), 4 O.W.N. 287, 23 O.W.R. 531, considered.

ACTION by an assignee of wages claims against the directors of an incorporated company to recover the amount of the claims, under sec. 98 of the Companies Act, R.S.O. 1914, ch. 178.

April 12. The action was tried by MIDDLETON, J., without a jury, at Toronto.

T. H. Peine, for the plaintiff.

D. Inglis Grant, for the defendants Glendenning and Mackie, and for Clarkson, added as a defendant at the trial.

Judgment for default was signed against the other defendants.

April 19. MIDDLETON, J.:—The action was brought by a storekeeper carrying on business at St. Anthony Mine, who claims to recover against the defendants, as directors of the

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Northern Gold Reef Limited, the sum of \$2,088.49 alleged to be due for debts for wages to labourers, servants and apprentices, for services performed for the company—the plaintiff being the assignee of the debts or claims.

The facts of the case are simple and undisputed: the whole question is, whether the plaintiff's claim, in whole or in part, can be brought within the statutory provision imposing liability upon the directors.

The mine was originally the property of the Sturgeon Lake Development Company, and the plaintiff's original transactions were with that company. The new company was incorporated and organised in January, 1913, and the course of business continued with the new company in precisely the same way that it had been carried on with the old company.

By an arrangement made on the 1st April, 1912, between the plaintiff and the Sturgeon Lake Development Company, the plaintiff agreed to move his store, then some distance from the mines, to the mines, and he was given the exclusive right to operate a store and pool-room there, in a building owned by the company, for a nominal rent. The company also agreed to supply him with electric light at a nominal charge. It was agreed—although the agreement was not reduced to writing—that the store should be run for the accommodation of the men working at the mines, and that the goods sold to the men should be charged up against their wages, and the amount so charged up should be paid to the plaintiff—payment being in this way secured to the plaintiff for all the goods sold. In order to carry this into effect, the purchasers were required to initial the vouchers, and the vouchers were then sent to the company; when the pay-cheques were drawn, a separate cheque was made out for the amount of each workman's store-bill, payable to the workman; the men then endorsed these cheques, and they were retained by the company. An adjustment was made monthly between the plaintiff and the company; he was given credit for the amount of these cheques so held and for any goods he had sold to the company; he was charged with the amount due for rent and for electric light and for anything else which he owed the company; and was then given a cheque for his net balance.

The bulk of the plaintiff's claim is based on cheques for balances due him, ascertained in this way. The remainder of his claim is based on wages-cheques given to the servants of the company and cashed by the plaintiff; and as to these the claim is admitted.

The plaintiff has sued the company, judgment has been recovered, and execution has been returned *nulla bona*. The suit against the company, outside the admitted claim, was not upon the cheques which the plaintiff holds; the claim (no doubt to aid his present contention) was made up of the balances due for wages, represented by the original cheques in favour of the men, which had never been in fact handed over to the plaintiff.

One object of dealing with the cheques in the way indicated was to avoid bank commission on the cheques, which had to be sent to Toronto to be cashed. Manifestly this was not the only object, for on each occasion there had to be an adjustment to ascertain the true amount due to the plaintiff.

Two cases have been determined upon this statute, in one of which the plaintiff succeeded, and in the other the plaintiff failed; and the question is, which governs the case in hand?

In *Lee v. Friedman* (1909), 20 O.L.R. 49, the facts were very similar to the facts here, but I think they are different in the essential point. There the plaintiff did not discharge the liability of the men for the goods bought until the money had been actually paid over by the company; and, the company not having paid either the plaintiff or the wage-earners, the plaintiff, as assignee of the wage-earners, was held entitled to recover the amount of his claim.

In *Olson v. Machin* (1912), 4 O.W.N. 287, 23 O.W.R. 531, the agreement with the men was, that the amount of their board should be deducted from their wages, this board being paid to the plaintiff. It was held that the plaintiff failed in his action against the directors, for the amount due was never due as wages, and never due to the workmen, but was due to the plaintiff under his contract with the company; and, therefore, the plaintiff could not claim under any equitable assignment of wages; and further, that, even if the money could have been at any time regarded as wages, the claim changed its character when the plaintiff accepted a note from the company for the

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balance due to him. His claim then became and was a claim upon this note, and not a claim for wages.

Neither of these cases is identical with that in hand; but I think the money became payable to the plaintiff by virtue of his direct contract with the company when the adjustment took place and he accepted the cheque. There was then a novation, and under this new contract the plaintiff became a creditor of the company in respect of the cheques given to him, and the demands ceased to be demands for wages within the meaning of the statute.*

This reduces the plaintiff's claim to the amount of the men's cheques held by him, which is \$376.21 plus some small sum for interest, which the parties can, no doubt, adjust.

The question of costs is not easy, because the plaintiff has failed on most of his claim, and the amount recovered is well within the County Court jurisdiction. I think the fairest solution is to allow him \$75 costs as against the defendants Glendenning and Mackie, and to declare his right to rank against the estate in the assignee's hands for these sums. There will be no costs as far as Mr. Clarkson is concerned.

*The Companies Act, R.S.O. 1914, ch. 178, sec. 98:—

(1) The directors of the company shall be jointly and severally liable to the labourers, servants and apprentices thereof for all debts not exceeding one year's wages due for services performed for the company while they are such directors respectively.

(2) A director shall not be liable under sub-section 1 unless

(a) The company has been sued for the debt within one year after it has become due and execution has been returned unsatisfied in whole or in part; or

(b) The company has, within that period, gone into liquidation or has been ordered to be wound up and the claim for such debt has been duly filed and proved,

nor unless he is sued for such debt while a director or within one year after he has ceased to be a director.

(3) If execution has so issued the amount recoverable against the director shall be the amount remaining unsatisfied on the execution.

(4) If the claim for such debt has been proved in liquidation or winding-up proceedings a director, upon payment of the debt, shall be entitled to any preference which the creditor paid would have been entitled to, and where a judgment has been recovered he shall be entitled to an assignment of the judgment.

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April 20.

REX EX REL. BOYCE V. PORTER.

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Municipal Elections—Proceedings to Unseat Persons Declared Elected—Municipal Act, R.S.O. 1914, ch. 192, secs. 161, 162, 163—Fiats Granted by County Court Judge—Interest of Relator not Made to Appear—Jurisdiction of Judge to Set aside Fiats—Rule 217—Orders Refusing to Set aside Fiats—Right of Appeal from, to Appellate Division—Persona Designata—Judges' Orders Enforcement Act, R.S.O. 1914, ch. 79, sec. 4.

Fiats under sec. 162 of the Municipal Act, R.S.O. 1914, ch. 192, allowing the relator to serve notices of motion for orders declaring that the defendants were not duly elected to municipal offices at municipal elections, though so declared, were granted by a County Court Judge. The defendants moved before the same Judge to set aside the fiats. The Judge held that he had no power to do so, and dismissed the motions, but gave the defendants leave to appeal; and they appealed to a Divisional Court of the Appellate Division:—

Held, by FALCONBRIDGE, C.J.K.B., and RIDDELL, J., that the Judge was *persona designata*, and the appeal lay, upon his leave, by virtue of sec. 4 of the Judges' Orders Enforcement Act, R.S.O. 1914, ch. 79.

Per LATCHFORD and KELLY, JJ., that this statute had no application to an appeal from the decision of a Judge under the authority conferred by Part IV. of the Municipal Act; and there was no right of appeal, with or without leave.

The Court being divided, the appeal was dismissed.

It was *held*, also, by FALCONBRIDGE, C.J.K.B., and RIDDELL, J., that the County Court Judge had power to make orders setting aside the fiats which he had granted (Rule 217); and that he should have made the orders: the fiats were improperly granted because the interest of the relator as an elector who had voted or tendered his vote at the election was not made in any way to appear upon the material brought before the Judge: secs. 161(2) (as amended by 4 Geo. V. ch. 33, sec. 5), 162(1), and 163 of the Municipal Act.

Review of the authorities.

At the municipal elections of the 4th January, 1915, the defendant Porter was declared to have been elected mayor and the defendants Ellis and Nelson controllers of the City of Ottawa. On the 12th February, the relator obtained from the Judge of the County Court of the County of Carleton, fiats under sec. 162 of the Municipal Act, R.S.O. 1914, ch. 192, to serve notices of motion for orders declaring that the defendants were not duly elected. Notices were served accordingly. On the 17th February, 1915, the defendants served notices of motion for orders setting aside the fiats and all proceedings founded thereon. The County Court Judge held that he had no power to make such orders. He dismissed the motions,

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but gave the defendants leave to appeal from the orders dismissing the motions; and the defendants appealed.

March 22. The appeals were heard by FALCONBRIDGE, C.J. K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

C. A. Masten, K.C., for the appellant Porter, and *J. D. Bissett*, for the appellants Ellis and Nelson. The order of the County Court Judge refusing to set aside the flats issued under sec. 162 of the Municipal Act is attacked. The Judge said in his written reasons that the flats should not have been issued, but he thought he had no jurisdiction to set them aside. We refer to the requirements of the Municipal Act, R.S.O. 1914, ch. 192, secs. 161, 162, 163, and contend that the interest of the relator is not made to appear, as required by sec. 163. An elector, as such, has no right to interpose unless it is made to appear that he has given or tendered his vote. See *Rex ex rel. McFarlane v. Coulter* (1902), 4 O.L.R. 520, *per* Street, J., at p. 522. The right of appeal is given by statute; the provision of sec. 179 applies to a final judgment. The jurisdiction conferred upon a Judge is given to him as *persona designata*: *In re Regina ex rel. Hall v. Gowanlock* (1898), 29 O.R. 435; *Regina ex rel. Chauncey v. Billings* (1888), 12 P.R. 404.

J. T. White, for the relator, the respondent, argued that there was no right of appeal but that given by statute, and that sec. 4 of the Judges' Orders Enforcement Act, R.S.O. 1914, ch. 79, did not apply. An appeal is allowed from a final order only, but this judgment is not final as against the appellants. He referred to *Regina ex rel. Grant v. Coleman* (1882), 7 A.R. 619; *Regina ex rel. O'Dwyer v. Lewis* (1881), 32 C.P. 104; *Re Moore and Township of March* (1909), 20 O.L.R. 67; *Regina ex rel. Pomeroy v. Watson* (1855), 1 U.C.L.J.O.S. 48; *Regina ex rel. Bartliffe v. O'Reilly* (1852), 8 U.C.R. 617; *Regina ex rel. White v. Roach* (1859), 18 U.C.R. 226; *Regina ex rel. Shaw v. McKenzie* (1851), 2 C.L. Ch. 36.

April 20. RIDDELL, J.:—At the municipal election of the 4th January, 1915, the appellant Porter was declared elected

mayor and the appellants Ellis and Nelson controllers of the city of Ottawa. On the 12th February, Boyce obtained from the Judge of the County Court of the County of Carleton fiats under sec. 162 of the Municipal Act, R.S.O. 1914, ch. 192, to serve notices of motion for an order that they were not duly elected, etc.

Notices were served accordingly. The appellants Porter and Ellis and Nelson, on the 17th February, 1915, served notices of motion "for an order to set aside the fiat granted in this matter for the issue of the notice of motion and all proceedings founded thereon."

The motions came on before His Honour, and he refused to make the orders asked for, on the ground of want of power to make such orders; his written reasons concluding thus: "The motion must therefore be dismissed, on the ground of the absence of authority in me to grant it. Under these circumstances, it would, I think, be improper for me to express an opinion on the other questions raised on this motion. There will be no costs of the motion, but its disposition is without prejudice to any other application that the parties may be advised to make in reference to these proceedings, if it be determined that I have authority to entertain it. Anything that I can do to facilitate an appeal from this order will be done."

Subsequently, and on the 6th March, formal orders were made allowing the appellants here to appeal.

The appeals have now been argued and fall to be decided.

The main ground of appeal is based upon the provisions of secs. 161 (2) (as amended by 4 Geo. V. ch. 33, sec. 5), 162 (1), and 163 of the Municipal Act.

In the affidavit filed by the relator, under sec. 162 (1), he does not describe his interest, etc., except by reference to the proposed notice of motion—he says only that he "has an interest in the election as an elector."

The fiat is not in general terms, but it simply orders that the relator, upon filing the statutory recognizance, "be at liberty to serve the said notice of motion."

The contention is, that the interest of the relator in the election is not made to appear, as required by sec. 163.

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Before the statute, one applying for an information in the nature of a *quo warranto* (which took the place of the ancient writ of *quo warranto*, long obsolete) was required to shew in his application that he was a person properly qualified to be a relator; and he could not subsequently supplement what he shewed on his application. "The rule is that at the time of moving you should give a good relator:" *Regina v. Thirlwin* (1864), 10 Jur. N.S. 206, 33 L.J.N.S.Q.B. 171, 9 L.T.N.S. 731.

In like manner, when the practice of granting a writ of summons in the nature of a *quo warranto* was introduced into our municipal system by the Act of 1849, 12 Vict. ch. 81, sec. 146, it was held that, when applying, the proposed relator must on his material establish his right to interpose—at least by alleging facts which would prove his status.

In 1851, the matter came up in *Regina ex rel. Shaw v. McKenzie*, 2 C.L. Ch. 36, 1 U.C.L.J. O.S. 50: it was not even suggested that the interest of the applicant need not appear on his material, but Draper, J., held (p. 44) that it was "enough if the interest claimed is substantially that required by the statute, though the precise term . . . is not used."

In *Regina ex rel. Bartliffe v. O'Reilly*, 8 U.C.R. 617, an objection was taken that the interest of the relator was not proved, but only alleged in his statement. The Court held that, while the affidavit did not verify the interest, the fact that "the particular interest had been declared in the statement and in the summons served on the party" was sufficient.

To understand this and similar cases, the Rules passed by the Judges in Michaelmas Term, 14 Vict., under the Act, must be looked at. They will be found in the first (1859) edition of Harrison's Municipal Manual at pp. 697 *sqq.* These provided that the material upon which the motion for a writ should be based should consist of: (1) a "statement" much the same as the present notice of motion; and (2) affidavits setting out "the facts and circumstances which shall support the application."

In *Regina ex rel. Pomeroy v. Watson*, 1 U.C.L.J. O.S. 48, Mackenzie, County Judge of Frontenac, held that the interest of the proposed relator need not appear in the affidavits—that

it was sufficient if it appeared in the statement, following the *Shaw* case.

In *Regina ex rel. White v. Roach*, 18 U.C.R. 226, it was held that it must appear on the material that the relator had voted at the election. This case well illustrates the strictness with which the Rules and statutes have been interpreted. The original Act, by sec. 146, had enabled "a candidate or voter in any election" to apply; in 1858, 22 Vict. ch. 99, sec. 127, changed this to "any candidate at the election or any elector who gave or tendered his vote thereat." In the case in 18 U.C.R. the proposed relator had said that "he protested and voted against Roach's election," but not that he had voted *at the* election. The full Court of Queen's Bench held this insufficient. This case is conclusive of the point now under consideration.

Mr. (afterwards Chief) Justice Hagarty in *Regina ex rel. Ross v. Rastal* (1866), 2 U.C.L.J. N.S. 160, speaks of the relator establishing "his right to interpose;" and throughout the cases it is apparent that the relator must in his material establish (in the sense at least of stating facts which, if true, would establish) his right to interpose. The omission of such a statement was fatal, not an irregularity which could be amended: *Regina ex rel. Chauncey v. Billings*, 12 P.R. 404. Such a statement was a prerequisite to the granting of the fiat; and, if it were wanting, the fiat and all proceedings based upon it would be set aside: *S.C.*, see especially p. 407; *Regina ex rel. O'Reilly v. Charlton* (1874), 10 U.C.L.J. N.S. 105; *Regina ex rel. Percy v. Worth* (1893), 23 O.R. 688.

While in the Revised Statutes of 1887 the writ of summons in the nature of a *quo warranto* is still prescribed (R.S.O. 1887, ch. 184, sec. 188), the Judges, under the powers given them by sec. 208 of that Act, made (1888) Rules governing the practice, which substituted a notice of motion for the writ; and this practice has since prevailed, being recognised by statutes 51 Vict. ch. 2, sec. 4, 55 Vict. ch. 42, sec. 188, and subsequent legislation.

The Consolidated Rules of 1888, Nos. 1038 to 1044, substitute a notice of motion for a writ of summons, and direct that in the notice of motion the relator must set out (1) his name in

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full, (2) his occupation, (3) place of residence, (4) "the interest which he has in the election as candidate or voter," and (5) his grounds of objection. The "statement" directed by the Rules of Michaelmas Term, 14 Viet., must set "forth the interest which the relator has in the election as candidate or voter" and the grounds of objection—equivalent and almost *totidem verbis* with (4) and (5) of the requisites prescribed by Rule 1040. There is no propriety in holding that the "interest" directed by Rule 1040 is any different from that in the former Rule; it must establish a right to interpose. The provisions for the practice in this regard were in 1897 taken into the statutes and left out of the Rules, but there was no change in the effect, nor has there been any change since.

It should, therefore, be held that it is necessary to shew somewhere in the material before the Judge on granting a fiat that the relator has the right to interpose.

The statute, sec. 161 (2), as amended by 4 Geo. V. ch. 33, sec. 5, gives the right to interpose to (1) candidates and (2) electors who gave or tendered their vote. An elector as such has no right to interpose, and "an elector" is all this relator claims to be. While it may not be necessary to establish the status by affidavit (*Regina ex rel. Bartliffe v. O'Reilly*, 8 U.C.R. 617), it must appear somewhere in the material. I think, therefore, that the fiats were improperly granted.

The next question is as to the jurisdiction of the County Court Judge to set aside his order. I entertain no doubt that he has such jurisdiction. There was under the former practice much difference of opinion on this matter.

In *Regina ex rel. Grant v. Coleman* (1881), 8 P.R. 497, 46 U.C.R. 175, and in *Regina ex rel. O'Dwyer v. Lewis* (1881), 32 U.C.C.P. 104, it was held that such power existed and should be exercised, but in *Regina ex rel. Grant v. Coleman*, in the Court of Appeal (1882), 7 A.R. 619, it was held differently.

Mr. Justice MacMahon, in the case in 12 P.R., set aside the fiat and all proceedings, while Mr. Justice Street in *Regina ex rel. McFarlane v. Coulter*, 4 O.L.R. 520, doubted the existence of the power. (The decision in the case in 12 P.R. does not seem to have been brought to his notice.)

The Rule introduced in 1888 (Con. Rule 536), which is now (substantially) Rule 217, gets rid of all difficulty, when it is remembered that now "the practice and procedure of the Supreme Court" is applicable in every case not provided for by the statute or Rules of Court.

The reasoning of the learned County Court Judge is, to my mind, inconclusive. He says: "The Rule now relied upon as giving jurisdiction on this motion is the Rule of Practice No. 217. This has been the Rule of Practice in both Superior and County Courts in the Province of Ontario since 1888. In my opinion, it does not apply to the present application. Reading Rules 216 and 217 together, it seems to me that they are intended to apply to interlocutory proceedings and to govern the rights of parties in litigation after proceedings have been taken. This Rule has not been invoked or referred to in any of the cases cited to me on the argument. If, however, it does apply, I cannot disregard the established practice under it, which is, that a motion to set aside an *ex parte* order may be answered by shewing that the party is entitled to the order if he can on the return of the motion establish facts which would warrant the making of the order in the first instance."

There is no limitation in the Rule to any particular form of order, and the value of this Rule should not be diminished by judicial construction. In *Barisino v. Curtis & Harvey (Canada) Limited*, 8 O.W.N. 195, decided by us on the 15th February, 1915, the facts were these. An action was begun in the name of Barisino; there being no one of that name, one Bardessano was served with an appointment and subpœna for an examination for discovery. He appeared with a solicitor and swore that he was the plaintiff, and the action proceeded accordingly. He did not appear at the trial, but evidence was given on behalf of the plaintiff. After verdict for the defendants, a fi. fa. for costs was put in the sheriff's hands. On his attempting to seize Bardessano's goods under the execution, Bardessano denied that he was the plaintiff. The District Court Judge made an *ex parte* order directing execution against Bardessano, which he set aside on motion. On appeal to us we held that the Judge

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should not on the facts have set aside his *ex parte* order, but none of us expressed or had any doubt of his jurisdiction to entertain the motion. There was nothing interlocutory or not final in its nature about the *ex parte* order, but the Judge had undoubted power to deal with it under Rule 217.

Then, while the proposed relator may in his new material establish a right to interpose, the omission is not an irregularity, and, as is shewn by the case in 12 P.R. and the English case cited, it cannot be supplied. We are not considering whether the Judge could have made an order then for a fiat, but could he support the order he had made? It is obvious that the new material could not be filed before the service of the notice of motion, as required by sec. 164 of the Act.

Moreover, the fiat was not general, but an order to serve a particular notice of motion. That notice of motion was fatally defective, and no order should have been made to serve it.

Again I say that we are not considering whether the Judge could have granted a fiat on the new material when it was brought before him. He did not purport to do that, but to support the order already made.

I think, therefore, that the County Court Judge should have set aside the fiat and all proceedings based upon it.

The more difficult question now arises as to our right to entertain the appeal.

The reasoning in *Regina ex rel. Grant v. Coleman*, 7 A.R. 619, that the Judge does not act as a Court in such proceedings is equally applicable in the present state of the legislation. "The machinery of the Court is made use of, but except in that particular . . . the proceedings are not to be regarded as an action or as analogous to an action in the Court." The Judge then is not acting as a Court, but is *persona designata*. When the case just referred to was decided, there was no appeal from an order, etc., made by *persona designata*; 56 Vict. ch. 13 was the first general statute—and that (sec. 6) forbade an appeal unless expressly authorised by the statute conferring jurisdiction. It was not till 1900 that a further exception was made and an appeal authorised if leave should be granted by the *persona designata* or a Judge of the Court of Appeal: 63

Vict. ch. 17, sec. 14. In 1909, a Judge of the High Court was substituted for a Judge of the Court of Appeal (9 Edw. VII. ch. 46, sec. 4), and in the Revision of 1914 a Judge of the Supreme Court.

In the present case, leave has been given by the *persona designata*, and I think we should entertain the appeal and allow it with costs.

Of course the appeal given in sec. 179 (1) of the Act is from the ultimate decision of the Judge on the merits: *In re Regina ex rel. Hall v. Gowanlock*, 29 O.R. 435, at p. 449: this appeal is to us under the Judges' Orders Enforcement Act, R.S.O. 1914, ch. 79, sec. 4.

The case of *Re Moore and Township of March*, 20 O.L.R. 67, is in the (former) Divisional Court of the High Court, and is not binding on us here. If anything I said there indicates that an appeal does not lie here, I wholly recant it.

Except as to the costs, the question as to whether an appeal lies is largely academic. The County Court Judge would, no doubt, govern himself by our expressed opinion and decline to give the relator any relief.

FALCONBRIDGE, C.J.K.B.:—I agree.

LATCHFORD, J.:—(*Rex ex rel. Boyce v. Porter*). This is an appeal from an order of the Judge of the County Court of the County of Carleton dismissing an application to set aside a fiat which he had granted permitting the relator to serve notice of a motion to set aside the election of the respondent as mayor of the city of Ottawa.

Leave to appeal against his order was given by the learned Judge.

The ground of the appeal is, that the relator, who was not a candidate at the election, did not state in his notice of motion that he was "an elector who gave or tendered his vote" at the election. The relator had in fact voted at the election. He was what the statute required him to be, but in his notice of motion stated simply that he was an elector. Upon this the learned Judge issued the fiat which he declined to set aside.

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Counsel for the relator raises the preliminary objection that no appeal lies to this Court.

The proceedings were instituted under the provisions of Part IV. of the Municipal Act, R.S.O. 1914, ch. 192, secs. 160-186, sec. 161 being amended by 4 Geo. V. ch. 33, sec. 5. Under sec. 179 (1), an appeal lies from the decision of a County Court Judge to a Judge of the Supreme Court. The appeal is from a final order or decision, and no other appeal is granted by the Municipal Act.

It is contended, however, that the County Court Judge acted as *persona designata*; and that, therefore, under the consent which he has given, an appeal lies to this Court under sec. 4 of the Judges' Orders Enforcement Act, R.S.O. 1914, ch. 79.

This section provides that there shall be no appeal from an order made by a Judge acting as *persona designata*, "unless an appeal is expressly authorised by the statute giving the jurisdiction or unless" (as in the present case) "special leave is granted by the Judge making the order or by a Judge of the Supreme Court, in which case the appeal shall be to a Divisional Court."

Assuming that the order was made by the Judge as *persona designata* by the Municipal Act, his leave to appeal would, upon the contention based on sec. 4 of ch. 79, give an appeal to a Divisional Court against any order—interlocutory or otherwise—which he might make, while under the Municipal Act itself (sec. 179) the appeal authorised is limited to an appeal from a final order only and is to be made to a single Judge, "whose decision shall be final."

Where a statute under which a Judge acts as *persona designata* is silent as to appeals from his decision, sec. 4 of ch. 79 applies; and leave granted by the Judge may enable a Divisional Court to entertain an appeal from his decision, though a majority of the Court thought otherwise in *Re Moore and Township of March*, 20 O.L.R. 67. But, in my opinion, ch. 79 has no application to an appeal from a decision made by a Judge acting under the authority conferred upon him by Part IV. of the Municipal Act. If he is a Judge of the Supreme Court, his decision, under sec. 179, is final, and there is no

appeal. Yet as Judge of the Supreme Court he is as much *persona designata* under Part IV. as is a Judge of the County Court. If ch. 79 had any application, a Judge of the Supreme Court could, by granting leave under sec. 4, enable a Divisional Court to entertain from his decision an appeal which the Municipal Act expressly prohibits.

I therefore think the preliminary objection holds, and that the appeal should be dismissed.

(*Rex ex rel. Boyce v. Ellis and Nelson.*) For the reasons stated in *Rex ex rel. Boyce v. Porter*, I think these appeals should be dismissed with costs.

KELLY, J.:—These appeals are from the decision of the Senior Judge of the County Court of the County of Carleton, given on motions before him for orders to set aside fiats (and all proceedings founded thereon), granted in each case on the 12th February, 1915, under sec. 162 of the Municipal Act, R.S.O. 1914, ch. 192, authorising the issue of notices of motion in proceedings to set aside the election of the defendants as members of the Municipal Council of the City of Ottawa, at the election held on the 4th January, 1915.

The substantial ground on which it was sought to set aside the fiats was that it was not shewn on the application itself that the relator was a candidate at the election or an elector who gave or tendered his vote, as required by the procedure laid down by the Act (sec. 161, as amended by 4 Geo. V. ch. 33, sec. 5, and sec. 163).

The learned Judge dismissed the motions, but granted leave to appeal.

Apart from the grounds above stated, a preliminary objection was raised, on behalf of the relator, that no appeal lies to this Court. This should first be disposed of.

The validity of the election of a member of a municipal council or his right to hold his seat may be tried and determined by a Judge of the Supreme Court, by the Master in Chambers, or by a Judge of the County or District Court of the county or district in which the municipality is situate: Municipal Act, sec. 161 (1).

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By sec. 179 (1), the decision of a Judge of the Supreme Court shall be final, but an appeal shall lie from the decision or order of the Master in Chambers or of a Judge of a County or District Court to a Judge of the Supreme Court, whose decisions shall be final. It would seem to have been the intention that the final tribunal should be a Judge of the Supreme Court. But, notwithstanding this, the contention is, that the right to appeal exists under the Judges' Orders Enforcement Act, R.S.O. 1914, ch. 79, sec. 4, by the terms of which, where jurisdiction is given to a Judge as *persona designata*, no appeal lies from his order unless an appeal is expressly authorised by the statute giving the jurisdiction, or unless special leave is granted by the Judge making the order or by a Judge of the Supreme Court, in which case the appeal shall be to a Divisional Court, whose decision shall be final.

Granted for the purpose of the present discussion that these motions came before the County Court Judge as *persona designata*, no appeal being expressly authorised from his decision except to a Judge of the Supreme Court, the only ground on which it can be argued that the appeal lies is that special leave was granted by him.

To hold that ch. 79 can be invoked to support the bringing on of this appeal would be to permit an appeal in cases where it is expressly prohibited by the Municipal Act; especially would this be so where the proceedings are instituted before a Judge of the Supreme Court, whose decision is, by sec. 179 (1), made final, but who would have it in his power, if ch. 79 has application, to defeat the express terms of sec. 179 (1) as to finality, by granting leave to appeal from his own decision.

But it may be argued that the limitation of appeals by sec. 179 (1) applies only to an order or decision finally disposing of the matters in issue, and not to decisions of matters of an interlocutory nature. If that were so, we should have the anomalous situation of possible appeals to a Divisional Court from interlocutory orders, when no such appeal lies from an order or decision determining the question in issue in the proceedings.

I can find no authority to substantiate the appellants' position on the question of the right to appeal; and I am of opinion that, whatever the merits of their case may otherwise be, there is no authority in this Court to entertain the appeal.

The motions should be dismissed with costs.

In that view it is unnecessary to discuss the question of whether the grounds relied upon by the appellants are such as entitle them to succeed—if the right to appeal were established—beyond expressing the view that the proceedings of the relator have not followed in every necessary particular the procedure laid down by the Municipal Act as amended.

Appeals dismissed; the Court being divided.

[APPELLATE DIVISION.]

WOLSELY TOOL AND MOTOR CAR CO. v. JACKSON POTTS & CO.

Principal and Agent—Customs Broker—Breach of Duty—Depriving Principal of Control over Goods—Negligently Entrusting Sub-agent with Bill of Lading Endorsed in Blank—Misdelivery of Goods—Negligence of Sub-agent and of Carriers—Third Parties—Liability over—Damages—Costs.

The judgment of MEREDITH, C.J.C.P., 33 O.L.R. 96, was affirmed. Consideration of the question of costs.

APPEALS by the defendants and the Great Northern Railway Company, third parties, from the judgment of MEREDITH, C.J.C.P., 33 O.L.R. 96.

April 19 and 20. The appeals were heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

A. Haydon, for the appellants the Great Northern Railway Company, relied on *Glyn Mills Currie & Co. v. East and West India Dock Co.* (1882), 7 App. Cas. 591, and the same case in (1880), 6 Q.B.D. 475, 492, and argued that the evidence of the railway clerk should be accepted in preference to that of Humphreys, the purchaser of the goods.

W. N. Tilley and J. J. MacLennan, for the defendants, appellants, referred to *De Bussche v. Alt* (1878), 8 Ch.D. 286, 310; *Hall v. Lees*, [1904] 2 K.B. 602; *Ross v. Fitch* (1880), 6 A.R. 7.

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[RIDDELL, J., referred to *Hillyer v. Governors of St. Bartholomew's Hospital*, [1909] W.N. 188.] Counsel referred also to the rule in banking transactions and the reason therefor given in *Prince v. Oriental Bank Corporation* (1878), 3 App. Cas. 325, 334; and to *Quebec and Richmond R.R. Co. v. Quinn* (1858), 12 Moore P.C. 232; *Armour v. Kilmer* (1897), 28 O.R. 618.

J. W. Bain, K.C., for the plaintiffs, respondents, argued that no negligence on their part had been shewn. The trial Judge did not believe the defendant Jackson as against the other witnesses. Jackson had been a broker for 25 years, and knew that it was his duty to take every possible precaution. As to the Turnbulls' agency, the trial Judge accepted the evidence of the plaintiffs' witnesses. The cases cited on behalf of the defendants did not shew that they should be relieved from the consequences of their negligence; and, even if not chargeable with negligence, they were liable for conversion. He referred to *Hiort v. Bott* (1874), L.R. 9 Ex. 86, 89; *Meyerstein v. Eastern Agency Co.* (1885), 1 Times L.R. 595.

Haydon, in reply, referred again to the *Glyn Mills* case, and to Halsbury's Laws of England, vol. 26, paras. 231, 256.

April 21. The judgment of the Court was delivered by FALCONBRIDGE, C.J.K.B.:—In this case, argued yesterday, my learned brethren thought that the appeals should both be dismissed.

I reserved judgment that I might look into the authorities cited. After an examination of these, I am unable to give effect to Mr. Tilley's argument.

The only possible doubt left was as to costs; but, in addition to the circumstance that costs are in the discretion of the trial Judge, there is the rule, generally followed, that, if the defence, however *bonâ fide*, be unreasonable, the party so offending is not entitled to be recouped his costs by another to whom he looks for indemnification.

Here the defendants should not have contested the claim of the plaintiffs, but should have paid without suit—then they might have sued those liable to them, if so advised.

The appeals should be dismissed with costs.

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J. EDWARD OGDEN CO. LIMITED v. CANADIAN EXPANSION BOLT
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Trade Mark—Infringement—Invented Word—Initials of Company's Name—Use of Similar Word by another Company in Rival Business—Validity of Registration—Right to Impeach—Confusion from Similarity of Names—Passing-off—Evidence.

It being the common practice of tradesmen and manufacturers to put the initials of their firms on their goods, their invoices, and letter paper, and to use such initials in various modes, a right which is substantially by way of monopoly should not be granted to one particular trader, to use, under the guise of a trade mark and for himself alone, initials which may be of general use in trade.

In re R. J. Lea Limited's Application, [1913] 1 Ch. 446, and *Registrar of Trade Marks v. W. & G. Du Cros Limited*, [1913] A.C. 624, applied.

And *quere* whether, in view of these decisions, the plaintiff company's trade mark "Sebco" (made up of the initials of the name of a company of which the plaintiff company was an offshoot), registered in Canada in 1910, would now be registered.

But, assuming that the plaintiff company's trade mark was to be treated as valid, then the trade mark "Cebcol" (made up of the initials of the name of the defendant company), registered by the defendant company, pending action, should also be treated as valid.

And *held*, in an action to restrain the defendant company from using the word "Cebcol" in connection with the sale of its goods (expansion bolts), also dealt in by the plaintiff company, that, upon the evidence, what was done by the defendant company was nothing more than an honest and fair use of the initials of the defendant company's own name to call the attention of the public interested to expansion bolts made or furnished by it, and not the output or product of any other concern.

In the case of honest traders accused of passing off their goods as the goods of a rival complainant, the rule of the Courts is, that it lies upon the complainant to make out beyond all question that the goods are so got up as to be calculated to deceive. That is a matter of proof by witnesses; and in that proof the plaintiff company had, upon the evidence, failed.

Payton & Co. v. Snelling Lampard & Co., [1901] A.C. 308, and *Claudius Ash Sons & Co. Ltd. v. Invicta Manufacturing Co. Limited* (1912), 29 R.P.C. 465, followed.

The Court will not interfere when ordinary attention would enable a purchaser to discriminate.

Johnson v. Parr (1873), Russell Eq. Dec. (N.S.) 98, followed.

The proof, by what is called "trap-evidence," of a single instance of the goods of one party (asked for by the trade name) being confused with those of the other, does not prevent the Court from dismissing with costs an action not otherwise supported.

Rutter & Co. v. Smith (1900), 18 R.P.C. 49, followed.

On the existing statutes as to trade marks, it is open to the defendant to impeach directly by his evidence the validity or efficiency of the plaintiff's registered trade mark.

Provincial Chemical Works v. Canada Chemical Manufacturing Co. (1902), 4 O.J.P. 545, and *Spilling v. O'Kelly* (1901), 8 Can. Ex. C.R. 426, followed.

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ACTION to restrain the defendant company from using the word "Cebcol" in connection with the sale of its goods, and for damages and an account of profits.

The action was tried by BOYD, C., without a jury, at Toronto.

J. F. Edgar, for the plaintiff company.

N. W. Rowell, K.C., for the defendant company.

- April 26. BOYD, C.:—The companies (plaintiff and defendant) deal in "expansion bolts," under which term are comprised three classes of products: (a) closed back machine shields; (b) expansion tag shields; and (c) screw anchors.

The first product forms the largest part of the defendant's business, and is not dealt in at all by the plaintiff. The other two products, *expansion shields* (made of malleable iron for use in stone and cement walls) and *screw anchors* (made of lead and used in wooden structures) are dealt in by both companies, and in both the screw anchor forms the smallest part of their trade.

The plaintiff company may be said to be derived from a United States corporation called The Star Expansion Bolt Company, who used as a trade mark for their goods, about 1903, the word "Sebco;" and their goods, under two descriptions, "Star" and "Sebco," were advertised and sold in the United States and in Canada prior to the incorporation of the plaintiff. Mr. Ogden, president of the United States company, took steps to organise the plaintiff in July, 1914; and, using his own name, it was incorporated as the J. Edward Ogden Company Limited. The plaintiff is spoken of and treated as the successor in Canada of the Star Expansion Bolt Company of the United States. The American company and Mr. Ogden both assigned to the plaintiff all their right, title, and interest in and to the trade mark "Sebco," which had been registered by the American company in the Department of Agriculture at Ottawa on the 10th July, 1910. It was assigned to the plaintiff company on the 16th September, 1914; and the action was brought on the 22nd October, 1914. This action proceeds on two grounds: first, that the defendant has applied the word "Cebcol" to its goods, which

is claimed to be "a fraudulent imitation of the plaintiff's trade mark" (para. 15 of claim); and, secondly, that the defendant sells and passes off its goods in a deceptive manner so as to induce purchasers to believe that the goods are those of the plaintiff (para. 14 of claim).

The plaintiff sets forth that the company and its predecessors have adopted a form of label, coloured yellow, having at its top in large letters "SEBCO," in the centre the representation of a screw anchor lying horizontally, and underneath the words "Screw Anchors," and then figures indicating the screw number and size of drill required and quantity in the package (para. 6 of claim); and the complaint is, that the defendant (para. 14) has sold and offered for sale screw anchors etc. with marks and labels in simulation and imitation of the plaintiff's marks and labels, and "the entire appearance and get-up of the defendant's label is so similar to the plaintiff's label as to deceive the public."

It is to be noted that the deception complained of is confined to the yellow label and its get-up, and does not extend to the package in which the label is placed. The pasteboard box is called "carton" by American usage; and, though some suggestion of injury on this score appears, it is not put forward as a factor in the gravamen of the complaint.

The genesis of the word used as a trade mark by the plaintiff is obvious: it is made up of the initials of the name "Star Expansion Bolt Company," and it was suggested to that company by the practice of their customers to write only the initials of the company in sending in orders for its products. This is indeed a very common plan of expediting oral and written intercourse—dropping the full names of corporations and using only the initial letters; and, if these happen to form any sort of vocable, that easily suggests itself as a good trade mark.

The American predecessor of the defendant was the United States Expansion Bolt Company, and that company availed itself of the first three words to form a trade mark "USE," which was regarded as an admirable stroke of business. Fol-

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lowing this well-recognised practice, when the representative of the United States Expansion Bolt Company, who had been doing business in Canada for that company, projected an offshoot company for this country, he decided on a name of the same geographical import as the American company, and had it incorporated as the Canadian Expansion Bolt Company, in March, 1914. It was easily the next step to take the initials of the company's name for the purpose of identifying the products with the company dealing in them, viz., C. E. B. Co. L., or CEBCOL, the word complained of.

Looking at the genesis of both trade words, and giving credence to the organiser of the defendant that he was not aware of the use in Canada of the word SEBCO when he put forth the initials of his company as a trade mark, I find myself unable to say that what was done was anything more than an honest and fair use of the initials of this company's own name to call the attention of the public interested in the output of this company's trade as being expansion bolts made or furnished by the defendant, and not the output or product of any other concern. Eliminating, therefore, any intention to practise unfair and dishonest competition, how are the facts of the case to be regarded?

Dealing with the question of the trade marks *per se*, and applying the test suggested by some Judges, when the two are not absolutely identical but similar—that is, place the words side by side and test by inspection of the eye whether one is an obvious imitation of the other—so far as the view goes, I would not conclude, in the absence of evidence, that an ordinary dealer in these goods or an ordinary purchaser of them would be confused: one has five letters, the other six, the first and last letters are different (C-L and S-O).

Tested phonetically, there is more likelihood of confusion, unless regard is had to the origin and the "C" is given the hard sound which is heard in "Canadian." This is indeed the way in which the defendant's mark was pronounced by the man in Aikenhead's, who largely dealt in the defendant's bolts; and, if it be called "Kebeol," none but the stupid or careless man who always blunders would be likely to confound the words.

Regard must be had to another aspect of the case, *i.e.*, the origins of both. I question whether the plaintiff's trade mark would now be registered, as a valid and distinctive name, in view of the recent decisions in *In re R. J. Lea Limited's Application*, [1913] 1 Ch. 446, 452, and *Registrar of Trade Marks v. W. & G. DuCros Limited*, [1913] A.C. 624, 632. The precise point is touched by Lord Shaw: "I do not think that any right which is substantially by way of monopoly should be granted to one particular trader, to use, under the guise of a trade mark and for himself alone, initials which may be of general use in trade." As pointed out by Farwell, L.J., in *In re Applications of W. & G. DuCros Limited*, [1912] 1 Ch. 644, 661, "it is the common practice of tradesmen and manufacturers to put the initials of their firms on their goods, their invoices, and letter paper, and to use such initials in various modes." And the meaning of the statutory word "distinctive" is "adapted to distinguish the goods of the proprietor of the trade mark from those of other persons . . . not only persons at present in the trade, but also persons who may in the future embark in the trade:" *per* Cozens-Hardy, M.R., in *In re Applications of W. & G. DuCros Limited*, [1912] 1 Ch. at p. 652. And in *In re R. J. Lea Limited's Application*, [1913] 1 Ch. at p. 464, Hamilton, L.J., says: "As a distinctive mark the proprietor's surname is adapted to distinguish the goods of the proprietor of the mark from those of persons who do not bear or use that name, but only to confuse them with the goods of other persons who do bear that name." See also *Slazengers Limited's Application* (1914), 31 R.P.C. 501, 507.

There were, when the plaintiff's trade mark was registered, dozens of companies using the descriptive words "expansion bolts" in the corporate names of their firms, such as Cinch Expansion Bolt Company and Standard Expansion Bolt Company, and of these at least three were disposing of their goods in Canada—the Star Expansion Bolt Company, the Diamond Expansion Bolt Company, and the United States Expansion Bolt Company. To all these companies the controlling initials EBCO were common property as indicative of the business they were engaged in. By the use of these public letters, with the

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“S” for “Star” prefixed, the plaintiff claims to have secured a monopoly in its favour, as against other possible prefixes and initial letters of the various firms who were then making and dealing in or might hereafter deal in expansion bolts.

Assuming that the trade mark of the plaintiff is to be treated as valid, then the trade mark registered by the defendant, pending action, of CEBCOL, should also be treated as valid, though I have my doubts as to the worth of either. Upon this part of the case, and generally as to other issues, I would cite *Coombe v. Mendit Ltd.* (1913), 30 R.P.C. 709, also *Pope Electric Lamp Co. Limited's Application* (1911), 28 R.P.C. 629, and *In re Horsburgh* (1878), 53 L.J. Ch. 237, note (Jessel, M.R.)

But it is not needful to pass upon this point in order to determine the present controversy.

As a matter of fact, the defendant has not used the word attacked apart from explanatory context. The use complained of is on labels where the word CEBCOL no doubt appears in the same position relatively as on the plaintiff's label, but the key to its import and significance is plainly printed in easily legible small-sized capital letters:—

“CANADIAN EXPANSION BOLT CO. LTD.

“TORONTO, CANADA.”

The evidence convinces me that this company was desirous to point out the meaning of the trade mark used, and to distinguish it from the rival company. The evidence further shews that the cartons in the market at the time were of green colour, readily distinguishable from the brown or greyish brown box in which the defendant's goods were packed. It is not proved that there is anything special or unusual in the cartons used by both as to shape and cover. The defendant says that it ordered boxes from an ordinary box-maker, and he furnished those of common and cheap character of his own motion. Nothing was in evidence to derogate from this statement.

There is but a limited public interested in and using these goods—chiefly, if not exclusively, hardware houses, contractors, builders, electricians, plumbers, and such like—very few customers indeed who buy the articles singly; and, when they do,

the evidence is that the particular article is asked for by name, and supplied by its being taken out of one of the cartons opened or kept open for the purpose. The sale is usually, however, in the boxes containing 100, of which complaint is made in the pleadings.

The public interested is an intelligent one—not likely to be deceived as to what is ordered or what is received, and it is of great significance that no single one of this constituency is called upon to give evidence or to prove actual mistake or misleading or confusion. In the case of honest traders accused of passing off their goods as the goods of the rival complainant, the rule of the Courts is, that it lies upon the plaintiff to make out beyond all question that the goods are so got up as to be calculated to deceive, and that is a matter of proof by witnesses: *Payton & Co. v. Snelling Lampard & Co.*, [1901] A.C. 308, 310; *Claudius Ash Sons & Co. Ltd. v. Invicta Manufacturing Co. Limited* (1912), 29 R.P.C. 465 (H. of L.).

I am quite in accord with the language of Ritchie, Eq. J., in *Johnson v. Parr* (1873), Russell Eq. Dec. (N.S.) 98, 100, referring to the get-up of goods and imitation labels: "A Court will not interfere when ordinary attention would enable a purchaser to discriminate. It is not enough that a careless, inattentive, or illiterate purchaser might be deceived by the resemblance, but the Court would inquire whether a person paying ordinary attention would be likely to be deceived."

At the last moment before action, a piece of what is called "trap-evidence" was procured by the plaintiff; but that single exceptional example emphasises the lack of any of the usual evidence given to prove deception in passing-off cases. The existence of such a scrap of evidence does not prevent the Court from dismissing with costs an action not otherwise supported: *Rutter & Co. v. Smith* (1900), 18 R.P.C. 49. I have no doubt that the explanation of the sale is that it was a blunder. As said by Esher, M.R., in *Turton v. Turton* (1889), 42 Ch.D. 128, 135, names may be so alike that careless people may not notice the difference, and the similarity may occasion such blunders; "but they are the blunders of the people who make the blunders."

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Here are the facts of this one instance of mistake. For the purpose of getting evidence in the suit, on the 3rd October, one Tyndall was sent by the plaintiff to Aikenhead's hardware store with a written order for 25 Sebeco screw anchors, and obtained two dozen, which he paid for, got an invoice, and brought back order and invoice to the plaintiff. The Aikenhead invoice was for "2 dozen Sebeco screw anchors." The clerk took the screws out of a yellow box on a shelf, labelled "Cebeol." The purchaser knew that the anchors were taken out of the wrong box, and that they were anchors dealt in by the defendant, but did not call the boy's attention to the mistake. This is the sole and only evidence of any confusion by witnesses, and this proves that the boy who sold the goods, and who was a raw hand taken from working the elevator at the noon hour, had made a mistake. It is proof of one blunder which does not implicate any one but the blunderer. Next, the same messenger was sent to order verbally 100 Cebeol screw anchors from the same firm, and there was procured a box with yellow label marked Cebeol, containing 100, with an invoice calling them "100 only lead screw anchors." This was on the 20th October, and the writ issued two days after, without any warning letter being sent to the defendant.

Another dealing is reported on the part of a clerk of McIntosh & Co., who are the exclusive Canadian agents for sale of the goods of the plaintiff and of the Star company, its predecessor—which does not appear to be of importance. The Canadian Electric Company on the 24th November, 1914, order 200 screw anchors from McIntosh, to be furnished according to sample. The sample sent was of "Cebeol" goods. McIntosh sent "Sebeco" goods, and part were returned as being too small and not suitable, and then the said witness bought sufficient Cebeol goods to fill the order. The witness knows both kinds of goods made by the parties, and would not mistake one for the other. He tells of the way the trade is conducted: the traveller that first goes round gets the order for expansion bolts of the kind he is selling unless the purchaser orders a particular kind. Mostly all the plaintiff's customers are in touch with the plain-

tiff's goods and ask for them as "Sebeo," and most of their orders come in marked "Sebeo."

McIntosh also says that hardware men handling the samples would not mistake the goods of the plaintiff for those of the defendant.

The plaintiff makes use of advertisements in workers' and trade journals to reach the public, and in these its goods are referred to as "Star" and "Sebeo," and reference is made to the Star Expansion Bolt Company as serving to explain the trade names. The defendant does not advertise in journals, but by samples in bags distributed and delivered to the trade dealers, contractors, and electricians, and by circulars all stamped with the name and referring to the Canadian Expansion Bolt Company.

Adverting to the three kinds of articles known as expansion bolts, no question arises as to closed back machine shells, which are not dealt in by the plaintiff.

As to the second class, expansion shields, they are put up by both parties in boxes of wood of quite different shape and appearance. Branded into the wood of the front end of the plaintiff's is the word SEBCO, with the print of a star underneath, all in black; whereas on the defendant's is the usual yellow label with the name of the defendant company printed at length. There can be no complaint as to this branch of the business.

As an instance of confusion, McIntosh, exclusive agent for the plaintiff, says that on the 3rd July, 1914, the Aikenhead Company addressed an order to the defendant, Canadian Expansion Bolt Company, for 1,000 "Sebeo" screw anchors, and that by mistake it came to the witness, who filled it with "Sebeo" goods. This of itself does not indicate confusion as to the goods or as to the companies. How the mistake occurred is not shewn, nor does it appear how the order came to the hands of McIntosh.

The whole stress of the conflict centres around the sale of a comparatively small part of the plaintiff's business, *i.e.*, the screw anchors, and, I think, the attack made fails.

As to impeaching the plaintiff's trade mark in this action by the defendant, that is permissible.

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The law is settled, on the existing statutes as to trade marks, that it is open for the defendant to impeach directly by his defence the validity or efficiency of the registered trade mark; and the whole situation was fully dealt with by Moss, J.A., in *Provident Chemical Works v. Canada Chemical Manufacturing Co.* (1902), 4 O.L.R. 545, 546. This decision was approved and followed by Burbidge, J., in the Exchequer Court of Canada, in *Spilling v. O'Kelly* (1904), 8 Can. Ex. C.R. 426.

Upon the whole contention, my judgment is against the plaintiff, and the action should be dismissed with costs.

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[APPELLATE DIVISION.]

April 26.

ACKERSVILLER V. COUNTY OF PERTH.

Highway—Nonrepair—Injury to Traveller—Road Assumed by County Corporation—Highway Improvement Act, R.S.O. 1914, ch. 40, sec. 19—Duty to Repair and Maintain—Negligence—Absence of Guard-rail at Dangerous Place—Liability of County Corporation—Limits of Road—Contributory Negligence—Findings of Trial Judge—Appeal.

The judgment of MEREDITH, C.J.C.P., 32 O.L.R. 423, was affirmed.

APPEAL by the defendant the Corporation of the County of Perth from the judgment of MEREDITH, C.J.C.P., 32 O.L.R. 423.

March 15 and 16. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, J.J.A.

Glyn Osler, for the appellant corporation, argued that the plaintiff had admitted on his examination that he had acted in a negligent manner. The culvert had been paid for by the county, but the ditch was constructed by the townships. He referred to the Highway Improvement Act, R.S.O. 1914, ch. 40, sec. 19; the Surveys Act, R.S.O. 1914, ch. 166, sec. 10; *Walton v. Corporation of York* (1881), 32 C.P. 35, 6 A.R. 181.

G. G. McPherson, K.C., for the defendants the Corporations of the Townships of Downie and South Easthope, argued that the county, by assuming the highway, freed the townships from liability. The necessary notice of claim was not given to South Easthope, and was insufficient. He referred to *Powell v. Main*

Colliery Co., [1900] A.C. 366; *Thompson v. Goold & Co.*, [1910] A.C. 409; *Regina v. City of London* (1900), 32 O.R. 326.

R. S. Robertson, for the defendant the Corporation of the City of Stratford, argued that sec. 443 of the Municipal Act, R.S.O. 1914, ch. 192, applied precisely to the case, and that under sec. 464 the city corporation was entitled to a remedy over.

R. T. Harding, for the plaintiff, the respondent, said that the ditch was filled up with weeds, the roadway was not in the centre of the culvert, and the roads were not at right angles. The county had maintained and repaired the road up to the city boundary. He referred to 23 Cyc. 39, note 25, as to the meaning of the word "intersect."

Osler, in reply.

April 26. The judgment of the Court was delivered by GARROW, J.A.:—Appeal by the defendant the Corporation of the County of Perth from the judgment at the trial of Meredith, C.J.C.P., in favour of the plaintiff.

The action was brought by the plaintiff against four municipal corporations, namely, the County of Perth, the Township of Downie, the Township of South Easthope, and the City of Stratford, to recover damages which he alleged had been caused to him by reason of the failure of the defendants, or some or one of them, in performing their statutory duty to repair and maintain a certain highway known as the Downie road, by reason whereof the automobile which he was driving was overturned, thereby causing damage to the automobile and severe personal injuries to himself.

The learned Chief Justice, in what was evidently a very carefully considered judgment, found in favour of the plaintiff against the defendant the Corporation of the County of Perth, and dismissed the action against the other defendants.

The case is reported in 32 O.L.R. 423, where the facts are very fully set forth.

The defendant the Corporation of the County of Perth appealed. There was apparently no formal appeal by the plaintiff against the judgment in so far as it dismissed the action against the other defendants; but on the hearing before us all

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four defendants were represented by counsel, and the argument proceeded as if such formal appeal had been duly made.

The main difficulty in the case seems to be, not so much as to what may be called the merits of the plaintiff's claim, as to which of the four municipalities should be held responsible.

The contention by counsel for the county is, that the Downie road, which runs north and south, and is the township boundary-line between the townships of South Easthope and Downie, as assumed by the county, ends towards the north at the southerly limit of Lorne avenue, which runs east and west, and is the boundary-line between the two townships on the south and the city of Stratford on the north. And sec. 19 of the Highway Improvement Act, and the dictionaries as to the meaning of the word "intersects" in that section, were referred to before us. The meaning of that section is, I think, quite plain; "intersect" is used in the sense of "crossing" or "passing across," with the result that there is "county road" on each side of the highway so intersected. That, however, is clearly not this case; and the section has, therefore, in my opinion, no application.

The by-law passed by the county on assuming the highway describes it as "the town-line between Gore of Downie and South Easthope, facing the 3rd, 4th, 5th, and 6th concessions." The 1st and 2nd concessions lie to the north of Lorne avenue, and are therefore now within the limits of the city of Stratford. The culvert and the ditch into which the plaintiff fell are situated in the line of Downie road, but to the south of the middle line of Lorne avenue.

Nothing in the language of the by-law, in my opinion, compels us, acting upon legal principles of construction, to adopt the contention of the defendant the county corporation as to the northerly limit of the highway assumed thereby.

The parties were not dealing with a mere paper line, or with a paper highway, but with an actual long-travelled and leading road from the south into the city of Stratford. It was doubtless the intention, in passing the by-law assuming that road by the county, to put it into a better state of efficiency than it had been when under the control of the township councils. That is the apparent and indeed the avowed object of the statute under

which the county acted in assuming the road. And, under the circumstances, it is, I think, quite unreasonable to suppose that it could have been intended that there should remain, as suggested, the hiatus, under the control of the township councils, of the few feet between the northerly terminus of the highway, as assumed by the county, and the northerly extension of that highway into and within the boundaries and jurisdiction of the City of Stratford. Nor, if there is any doubt about the proper construction of the language of the by-law, is it unimportant to observe that the parties themselves did not so interpret it, for it is in evidence that after the by-law was passed the county removed the former culvert built by the townships, and built the present one on its site, at an expense, it is said, of something over \$100. True, the County Clerk at the trial deposed that this was done in error, but no explanation was given by the witness as to how the error came to be committed or by whom it was actually made, for it was not, I suppose, made by the witness himself.

Altogether I am very much inclined to doubt the alleged error, and to suspect that its suggestion is of the kind known as wisdom after the event.

I am, therefore, of the opinion that the conclusion of the learned Chief Justice, placing the responsibility for the plaintiff's injury upon the county corporation, was correct. I also agree generally with his reasoning and conclusion as to what I have before called the merits of the plaintiff's claim, and have very little to add. The one point upon which I had some doubt was as to whether the conduct of the plaintiff on the occasion in question was so reasonable as to excuse him from the charge of having contributed to the result from which he suffered. The night was dark. He apparently, although residing in the adjoining city, was not familiar with the ground, and there is, to me at least, the suggestion of recklessness in what he did.

My doubt, however, is not sufficiently strong to justify me in dissenting from the conclusion in the plaintiff's favour upon the issue of contributory negligence.

For these reasons, I would dismiss the appeal of the county corporation with costs.

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[APPELLATE DIVISION.]

Jan. 6.
April 26.

RE SINGER.

Will—Construction—Gift of Income to Wife for Life or Widowhood “for the Maintenance of herself and our Children”—Equal Division of Corpus among Children upon Death or Re-marriage of Wife—Obligation of Wife to Maintain Children—Discretion—Forisfamiliation or Marriage—Provision for Advancement to Sons upon Attaining Certain Age—Effect of Codicil—Postponement of Time for Division of Real Estate—Conversion of Real Estate by Trustees—Interest upon Sums Advanced—Security—“Loan.”

The testator died in 1911, and left surviving him his widow and eleven children, the eldest of whom was in 1915 forty-two years of age and the youngest seventeen; there were eight sons, three of whom had attained the age of thirty. The will was executed in 1904, and a codicil in 1911, just before the death. By the will trustees were appointed, and they were directed to pay to the testator's wife “during the term of her natural life and as long as she will remain my widow the net annual income arising from my estate for the maintenance of herself and our children.”—

Held (1), that under this clause the wife was entitled during her widowhood to receive the income, subject to an obligation on her part to maintain the children out of it, the manner in and the extent to which provision should be made for each child being left to her discretion—a discretion not subject to control or interference by the Court so long as exercised in good faith; and, so long as the discretion of the widow was not impeached, there should be no inquiry as to an allowance to the children for maintenance.

Review of the authorities.

Allen v. Furness (1892), 20 A.R. 34, followed.

In re Booth, [1894] 2 Ch. 282, considered.

(2) That the widow, in carrying out the object with which the income was given to her, was not bound to take into consideration the need of support of children who had become forisfamiliated or had married.

Cook v. Noble (1886), 12 O.R. 81, approved.

In re Miller (1909), 19 O.L.R. 381, overruled.

(3) The will provided that, upon the death or re-marriage of the wife, the estate was to be divided among the children, share and share alike, the share of each child to be paid over at majority; and the trustees were directed “to pay to each of my sons who shall reach the age of thirty years a sum equal to half that portion of my estate to which such son is entitled under this my will upon the death of his mother, such portion to be valued at the time of each son attaining his thirtieth year, the valuation to be made by my executors and trustees and shall be final. Such payment to be considered as a loan from the estate.” Clause 10 of the codicil provided “that my real property shall not be divided among the beneficiaries as directed by my will until after the lapse of ten years from my death, and . . . that the business of managing my real estate shall be carried on by my sons as it has been carried on heretofore, and . . . my sons shall receive such salaries as shall seem just in the discretion of my executors in remuneration for their services.”—

Held (MAGEE, J.A., dissenting), that the intention of the testator was that, as far as it should be practicable to do so, his lands should be retained in specie and should be managed by his sons, and that the division of his estate, so far as it consisted of real property, which was to have taken place upon the death or re-marriage of his wife, should be postponed, if

either of these events should happen within ten years after his death, until the expiration of that period—and that was the effect of clause 10 of the codicil; that the direction of the will as to the payment to the sons was inconsistent with clause 10 of the codicil, so interpreted, and was *pro tanto* repealed; and that the executors and trustees were not bound to convert any of the real estate for the purpose of making payments to the sons, and would not be justified in converting it unless to prevent loss by depreciation or to pay incumbrances or debts.

Per MAGEE, J.A.:—The codicil should be construed as not interfering with the provision in the will for payment by way of loan to the sons on attaining the age of thirty years.

(4) That, if there should be money available for making payments to the sons, they could not be required to give security for what they might receive, or to pay interest upon it.

Judgment of MIDDLETON, J., varied.

MOTION by Moses Joel Singer, executor of Jacob Singer, deceased, for an order determining certain questions as to the construction of the will and codicil of the deceased.

December 30, 1914. The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

H. H. Dewart, K.C., for the applicant.

M. K. Cowan, K.C., and *H. E. Rose*, K.C., for Israel Singer and Alexander E. Singer.

G. H. Watson, K.C., for Annie Singer.

M. H. Lugwig, K.C., for the widow of Solomon Singer.

H. S. Osler, K.C., for the infant children of Solomon Singer.

F. W. Harcourt, K.C., for the infant Fannie Singer.

C. J. Holman, K.C., for the other children of the deceased.

January 6. MIDDLETON, J.:—The late Jacob Singer died on the 13th November, 1911, leaving him surviving his widow, now sixty-two years of age, and eleven children, the eldest being Mrs. Miller, now forty-two years of age, and the youngest Fannie, now seventeen. Of the sons, three, Moses, Max and Israel, have attained thirty years of age; five are yet under that age.

Mr. Singer left a large estate, almost all of it being land. He owned about 300 houses in Toronto. These are all subject to incumbrances, and it is as yet impossible to state how much will ultimately be realised. The mortgage and other indebtedness amounts to almost \$350,000; the estimated net value of the estate being somewhere between \$400,000 and \$500,000.

Mr. Singer's will bears date the 16th May, 1904; there is a

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codicil dated the 31st October, 1911; and the most serious difficulty arises when it is attempted to ascertain the effect of the codicil upon the provisions of the will.

By the will, the executors are given full power to deal with the estate as they think best, to realise and invest in their own discretion; and the net annual income is to be paid to the wife during her life and widowhood "for the maintenance of herself and our children." Upon the death or re-marriage of the wife, the estate is to go to the children, share and share alike, to be paid over to each child on attaining twenty-one years of age. There is a provision that grandchildren are to stand in the place of any child who predeceases the wife, and that, if the child leaves no issue, then the surviving children are to take, share and share alike.

So far, the will is comparatively free from difficulty. It also contains a provision directing the trustees to pay to each son who shall attain the age of thirty years a sum equal to one-half the portion to which he is entitled under the will upon the death of his mother; this amount to be estimated by the executors, whose decision shall be final. The will then provides, "such payment to be considered as a loan from the estate." The clause relating to division provides that there shall be deducted from the share of each child "any sum or sums which shall already have been advanced to such child."

By the codicil, clause 10, the testator directs that his "real property shall not be divided amongst the beneficiaries as directed by my will until after the lapse of ten years from my death." The net income from the estate, over and above all outgoings properly chargeable against the life-tenant, is considerable, possibly between \$25,000 and \$30,000 per annum.

The questions which now arise are:—

(1) As to the widow's right to the income: does she take this absolutely during her life and widowhood, or does the provision in the will which directs the income to be paid to her for the maintenance of herself and "our children," impose any obligation upon her to use any part, and if so what part, of the income for the benefit of the children?

A subsidiary question was suggested upon the argument,

which does not require much consideration. It was suggested that there was some resulting trust which prevented the widow from retaining as her own anything not needed for the maintenance of herself and the children. There is no foundation for this contention. If authority is needed, it will be found in *Re Robert George Barrett* (1914), 5 O.W.N. 805.

It is quite hopeless to attempt to reconcile all that has been said by different Judges upon devises somewhat similar to that in question here, and I am inclined to think that the cases are of little real use. Mr. Singer undoubtedly had unbounded confidence in his wife. Many expressions in the will point in that direction; and I think that his dominant intention was that during the lifetime of the wife, so long as she remained his widow, she should occupy substantially the same position towards the children as he occupied himself. These children would all inherit handsome fortunes. The difference in the ages of the children is great—twenty-five years between the oldest and youngest. At the time of the writing of the will the mother was only fifty-two years of age. The final division would only take place upon her death or re-marriage, an event that might be postponed for many years. As the sons attained the age of thirty years, each was to receive an advancement of half of his prospective share.

In the meantime, the mother was to receive the income; I cannot think without some corresponding obligation. The children who had been nurtured by the testator were not to be left without any right to anything in the interval between attaining majority and receiving their advancement. The best view that I can form is, that the mother, who was to receive this large income, was to use her judgment as to the sum that should be paid to the different members of the family for maintenance.

The decision in *In re Booth*, [1894] 2 Ch. 282, appears to me to apply. There the testator gave the estate to his trustees, and directed them to pay the income to his wife "for her use and benefit and for the education and maintenance of my children," and upon her death to divide it equally between all his children. The holding was, that the wife took the income subject to a trust for the maintenance and education of the children, and that the

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trust was not limited to children under twenty-one or unmarried. North, J., who determined the case, after so holding, states: "It is not, however, a trust for all the children equally; some may take nothing at all. The widow has a discretion as to the amount to be applied for each child. If there are children who do not require maintenance, they are not to have any of the income: a discretion is given to the widow."

The case, I think, falls within what is said by Theobald, 6th ed., p. 476: "The gift may be so expressed as to entitle the parent to the gift subject to the obligation of maintaining the children so far as they require it. This is the case if the gift is to the testator's widow for her use and benefit and for the maintenance of his children. . . . In such cases the Court will not interfere with the parent's discretion so long as it is honestly exercised. But it will, if necessary, administer the trust and direct an inquiry to bring out the facts. If the will does not impose a limit, maintenance may be allowed to a child requiring it who has attained twenty-one, and also to a married daughter."

Here, the applicants have made out a *primâ facie* case of needing parental assistance. The mother has taken the position, not that she has exercised a discretion, but that she is absolutely entitled to the income, and that the children have no right.

If the mother is ready to exercise her discretion and make some reasonable allowance to those of the children apparently in need, then I do not think the Court should interfere; and I trust that the matter may even yet be amicably arranged. If not, I think the children so desiring are entitled to a reference on the lines indicated by Mr. Justice North in the case already referred to.

At first I thought that the clause providing for the maintenance of infant children after the wife's re-marriage weighed somewhat against this construction; but, when it is considered that upon the re-marriage of the wife the adults at once receive their shares, this clause is seen to be colourless.

The second question is that of the right of the sons who have attained thirty years of age to insist on an advancement. The executors have not yet sold any of the realty, and there is nothing in hand out of which an advancement can be made, unless a

sale of the realty is enforced, or some further incumbrance is placed upon it. The widow and the majority of the executors take the position that the effect of the 10th clause of the codicil, providing that there shall be no division of the real property until after the lapse of ten years, prevents the making of any advancement.

The conclusion at which I have arrived upon this question is that the effect of the clause in question is to preclude any division, either upon the death or re-marriage of the mother, or by way of preliminary advancement, so far as the real estate is concerned. The intention of the testator, I think, was to give to his executors ten years before they should be called upon to distribute the real estate. If at any time there is on hand personal property or the proceeds of real estate available for distribution, this may be advanced to the sons. I think the advancement clause does not contemplate an allotment of real estate in specie. As such advancements are made, the mother's income must necessarily be kept down to some extent; but she will be released *pro tanto* of her obligation to assist in the maintenance of the sons receiving the advancement.

The question is then raised as to whether interest should be charged upon any sums which are advanced. The underlying principle of all the cases is, that interest is charged for the purpose of producing equality among those who are ultimately entitled to share. Inasmuch as the entire income goes to the widow, and as the advancement, which cuts down the income, indirectly enures to her benefit, by relieving her *pro tanto* from the obligation to maintain, this principle has no application here. Equality among the children, so far as the capital is concerned, is not interfered with; the elder child, by virtue of his seniority, receives an advancement on account of his ultimate share. This is a benefit conferred upon him by the testator, who has not exacted any terms. *Re Hargreaves* (1903), 88 L.T.R. 100, and *In re Craven*, [1914] 1 Ch. 358, as well as the cases collected in *Re Nordheimer* (1913), 29 O.L.R. 350, establish the principle upon which the Court acts.

The next question is as to the respective duties of the executors and managers under the will and codicil. Under the will,

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after the appointment of executors, it is stated: "The manager of the estate is to be selected by a majority of my children, assented to by my wife; such manager is to get a reasonable salary and to be one of the heirs." By the codicil the executors are changed, and it is provided: "I further direct that the business of managing my real estate shall be carried on by my sons as it has been carried on heretofore, and I direct that my sons shall receive such salary as shall seem just in the discretion of my executors in remuneration for their services."

The testator evidently contemplated the employment as a continuation of the employment of his sons during his lifetime in the renting, repairing, and general management of the large amount of real estate held by him. For this duty those actively employed were to receive remuneration. The executors were to be relieved from this detailed work, which was to be performed by the salaried employees. The executors, as executors, were to receive no remuneration.

It is asked, finally, if the executors are entitled to receive remuneration for their services as executors and trustees. The will expressly provides that they shall not, and I cannot relieve them from this disability. If they did not like to accept the position offered by the testator, they could have renounced probate. Having accepted the position, their rights depend substantially upon contract. It should have been mentioned that Solomon's children are not within the class entitled to maintenance from the widow.

Costs of all parties may come out of the estate.

Annie Singer appealed from the judgment of MIDDLETON, J.; and Israel Singer and Alexander E. Singer also appealed.

February 17, 18, and 19. The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

G. H. Watson, K.C., and *S. J. Birnbaum*, for the appellant Annie Singer. No obligation is imposed on this appellant (the widow) by the will. *Re Robert George Barrett*, 5 O.W.N. 805, was reversed on appeal: see *S.C.* (1914), 6 O.W.N. 270. We refer to *Hart v. Tribe* (1854), 18 Beav. 215; *Thorp v. Owen* (1843), 2 Hare 607, where there was held to be an absolute bequest to

the wife of a life estate; *Jones v. Greatwood* (1853), 16 Beav. 527; *Byne v. Blackburn* (1858), 26 Beav. 41; *Lambe v. Eames* (1871), L.R. 6 Ch. 597; *Mackett v. Mackett* (1872), L.R. 14 Eq. 49; *Bond v. Dickinson* (1875), 33 L.T.R. 221; *In re Hutchinson and Tenant* (1878), 8 Ch. D. 540; *In re Adams and Kensington Vestry* (1884), 27 Ch. D. 394; *Morrin v. Morrin* (1886), 19 L.R. Ir. 37; *Bank of Montreal v. Bower* (1889), 18 O.R. 226; *Allen v. Furness* (1892), 20 A.R. 34; *Mussoorie Bank v. Raynor* (1882), 7 App. Cas. 321; *In re Hamilton*, [1895] 2 Ch. 370; *In re Williams*, [1897] 2 Ch. 12, at p. 21; *In re Atkinson* (1911), 80 L.J. Ch. 370; *Hill v. Hill*, [1897] 1 Q.B. 483; *Johnson v. Farney* (1913), 29 O.L.R. 223; *Re Kelly and Gibson* (1914), 6 O.W.N. 173. Maintenance is allowable only during infancy and while the child is under the parental roof: *Cook v. Noble* (1886), 12 O.R. 81; and see also *In re Miller* (1909), 19 O.L.R. 381; *Macdonald v. McLennan* (1884), 8 O.R. 176; *Bigelow v. Bigelow* (1872), 19 Gr. 549. Even if the widow marries or dies, the estate is not to be distributed for ten years: *Thornhill v. Hall* (1834), 2 Cl. & F. 22; *Bristow v. Masefield* (1882), 52 L.J. Ch. 27; *In re Jessop* (1859), 11 Ir. Ch. R. 424; *Davis v. Bennet* (1861), 30 Beav. 226. On the meaning of "loan," see *Rodman v. Munson* (1852), 13 Barb. (N.Y.) 63.

C. J. Holman, K.C., for Max Singer and others, on the question of maintenance, referred to *Re Sproule* (1889), 17 O.R. 334; *Cook v. Noble*, *supra*; *Frewen v. Hamilton* (1877), 47 L.J. Ch. 391; *Hadow v. Hadow* (1838), 9 Sim. 438; *Gardner v. Barber* (1854), 18 Jur. 508; *Staniland v. Staniland* (1865), 34 Beav. 536; *Collier v. Collier* (1796), 3 Ves. 33; *Re Shortreed* (1903), 2 O.W.R. 318, and cases there cited; *Re Pringle* (1911), 3 O.W.N. 231; *Re Soullière and McCracken* (1913), 4 O.W.N. 1092; *McIsaac v. Beaton* (1905), 37 S.C.R. 143, approving *Lambe v. Eames*, *supra*; *In re Oldfield*, [1904] 1 Ch. 549; *Mackett v. Mackett*, *supra*; *In re Adams and Kensington Vestry*, 27 Ch. D. 394, at p. 409.

H. E. Rose, K.C., and *J. W. Pickup*, for Israel Singer and Alexander E. Singer, referred, on the question of maintenance, to Theobald on Wills, Can. ed. (1908), pp. 485, 497(g), and especially pp. 492-3, where the cases cited by the appellants are

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considered. They also referred to *Re Robert George Barrett, supra*; *Thorp v. Owen, supra* (referred to in *In re G. (Infants)*, [1899] 1 Ch. 719); *Bank of Montreal v. Bower, supra*; and *Re Kelly and Gibson, supra*—pointing out distinctions. *Frewen v. Hamilton, supra*, is really in our favour; see at p. 41. *Hadow v. Hadow, supra*, is authority only for the proposition that the widow is not liable to account. See *In re Pollock*, [1906] 1 Ch. 146. *Gardner v. Barber, supra*, *Staniland v. Staniland, supra*, *Re Shortreed, supra*, *Re Oldfield, supra*, are all distinguishable upon the facts.

G. S. Hodgson, for M. J. Singer, the surviving executor, on the question of advancement with reference to the minority of the children, referred to *K'eogh v. K'eogh*, [1911] 1 I.R. 396.

M. H. Ludwig, K.C., for the widow of Solomon Singer, respondent, on the question of advancement, referred to *Re Aldridge* (1886), 55 L.T.R. 554, at p. 556.

F. W. Harcourt, K.C., Official Guardian, for the infants.

Watson, in reply, referred to *Camden v. Benson* (1835), 4 L.J. Ch. N.S. 256, and *Hamley v. Gilbert* (1821), Jac. 354.

April 26. MEREDITH, C.J.O.:—This is an appeal by Annie Singer from the judgment dated the 20th January, 1915, which was pronounced by Middleton, J., on an originating motion for the construction of the will and codicil of Jacob Singer, and a cross-appeal by Israel Singer and Alexander E. Singer from the same judgment.

Jacob Singer died on the 13th November, 1911, and left surviving him his widow, Annie Singer, and eleven children, the eldest of whom, Mrs. Miller, is forty-two years of age, and the youngest, Fannie, seventeen. Of the children, eight were sons, and three of them, Moses, Max, and Israel, have attained the age of thirty. The will is dated the 16th May, 1904, and the codicil bears date the 31st October, 1911.

The first question for decision is as to the effect of the following clause of the will: "I direct my said trustees to pay to my wife Annie Singer during the term of her natural life and as long as she will remain my widow the net annual income arising from my estate for the maintenance of herself and our children.

Should however my said wife re-marry then such annuity shall cease.”

It is not a little singular that at this time of day there should be any reason for doubts as to the legal effect of this provision. Thousands of wills containing a similar provision have been made, and it is a form commonly in use by testators desiring to provide for the maintenance of their wives and children.

Apart from authority, I should have no doubt as to what the testator meant or as to what the language he has used to express his wish imports, and that is, that his wife should be entitled during her widowhood to receive the income, subject to an obligation on her part to maintain the children out of it, but leaving to her discretion the manner in and the extent to which provision should be made for any child, a discretion not subject to control or interference by the Court so long as it should be exercised in good faith; and that, as I understand the decision of the Court of Appeal in *Allen v. Furness*, 20 A.R. 34, was that Court's view of the effect of such a provision as the will in question contains. In that case the appeal was from the judgment of the Chancellor, and he and Maclellan, J.A., who delivered the judgment of the Court of Appeal, referred with approval to the decision of Vice-Chancellor Kindersley in *In re Robertson's Trust* (1858), 6 W.R. 405.

In that case the bequest was of a sum of £7,000 to the nephew of the testator “for the maintenance and support of himself and his family,” and the Vice-Chancellor in delivering judgment said that he had not “the smallest doubt that the testator intended the legacy to be paid to the legatee, taking it for granted that, like any other father, he would maintain and support himself and his family thereout. That being so, he did not mean to express any trust, and therefore there must be a direction that the £7,000 be paid to the petitioner, in the words of the will, namely, ‘for the maintenance and support of himself and family;’” and the Vice-Chancellor added that “the only effect would be that, in case any child was not maintained, he might apply to the Court.”

This last observation was quoted by Maclellan, J.A. (20 A.R. p. 41), and he does not suggest that he does not agree with it.

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Referring to *Lambe v. Eames*, L.R. 6 Ch. 597, MacLennan, J.A. (p. 41), said that he was unable to distinguish the case with which he was dealing from that case; adding: "The words, 'to be at her disposal in any way she may think best', which were contained in that devise, but not in the present one, can, I think, make no difference, for they add nothing to the effect of a simple gift, and the remaining words are in substance the same as the present, for 'family' means 'children.'"

In *In re G. (Infants)*, [1899] 1 Ch. 719, the trustees were directed to pay the annual income of the trust estate to the testator's wife during her life if she should so long continue his widow, "she maintaining, educating, and bringing up such of" his children . . . ; and Kekewich, J., referring to this provision, said that it was urged on behalf of the children, and not denied on behalf of the mother, that it imposed upon her an obligation enforceable by the Court; and, dealing with the character of the obligation, he said: "It matters not how the enforceable obligation ought technically to be defined. It may be regarded either as a trust or as an implied contract. There is a close analogy between cases of this character and those where a gift of property has been coupled with an obligation to repair. Some cases of the latter class have recently been commented on by the Lord Chief Justice in *Blackmore v. White*, [1899] 1 Q.B. 293, and he seems to treat the right of enforcing such obligation as resting on implied contract, and that view is at least consistent with the judgment in *In re Skingley* (1851), 3 Macn. & G. 221, which for some time was treated, and perhaps may still be treated, as the leading authority on the subject. North J.'s decision in *In re Booth*, [1894] 2 Ch. 282, and that of Knight Bruce, V.-C., in *Longmore v. Elcum* (1843), 2 Y. & C. Ch. 363, both of which are cases of the class here under consideration, treat the obligation as founded in trust and enforceable by exercise of the jurisdiction which the Court has over trustees. But they equally treat the obligation as enforceable, and, as already mentioned, that is not denied."

In *In re Pollock*, [1906] 1 Ch. 146, a widow to whom property was devised in trust during her widowhood for the benefit and maintenance of herself and of the children of her deceased hus-

band and herself, and the proper bringing up of the children, was held to have the powers of a tenant for life under sec. 58, sub-sec. 1 (vi.), of the Settled Land Act, 1882, and it was held, or at all events assumed, that the interest of the widow was charged with the maintenance of the children.

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I do not read *In re Booth* (*supra*) as deciding anything different from what was decided in *Allen v. Furness*. In both cases the Court had to deal with a case in which it was sought to make available for the benefit of the creditors of the beneficiary the whole of what was given to the beneficiary, in the one case "for her use and benefit and for the maintenance and education" of the testator's children, and in the other "during his life for the support and maintenance of himself and his (three) children;" and what the Court did in *Allen v. Furness* was to refuse to give to the creditor equitable execution except upon the terms that what the Court deemed to be a reasonable sum should be applied for the support and maintenance of the children; and what was done in the other case was to direct an inquiry as to "whether any and if any what provision ought to be made for the maintenance of any, and if any which, of the children of the testator out of the income of the testator's estate."

Mr. Justice North says in *In re Booth* ([1894] 2 Ch. at pp. 284-5): "The words" (i.e., "for the maintenance and education of my children") "are, in my opinion, inserted with the view, not that she should spend the income for any purpose she liked, but that she should have it for her use and benefit, and also 'for the maintenance and education of my children.' That was the object to which the money was to be applied. In my opinion, those words were inserted for the purpose of shewing the object, or intention, or trust, whichever you choose to call it, with or upon which the testator made the gift to his wife. Suppose the gift had been made to a stranger for his use and benefit, and for the maintenance and education of the testator's children, could there have been any doubt that he would have taken the income subject to a trust for the maintenance and education of the children? No doubt the widow takes a share in the income; but I cannot say that the children are excluded from all

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interest, any more than I could if the widow had been a trustee—for she is a trustee—for any other persons.”

These observations seem to indicate that, in the view of the learned Judge, the wife took the income subject to a trust for the maintenance and education of the children; and, if that is the effect of his decision, it is opposed to *Allen v. Furness*, and we must follow that case in preference to *In re Booth*.

Nothing, however, was decided in *In re Booth* that is inconsistent with the view that, had the widow not become bankrupt and the income had been claimed by her creditors, the Court would not have interfered with the exercise of her discretion, if it were exercised in good faith, as to the manner in which and the extent to which she should provide for the maintenance and education of the children.

The next question is as to whether the widow, in carrying out the object with which the income was given to her, is bound to take into consideration the need of support of children regardless of whether or not they have become forisfamiliaried or have married.

In *Cook v. Noble*, 12 O.R. 81, it was decided by Proudfoot, J., after a review of the authorities, that, where the right to maintenance and support is given in general terms, it will cease with the marriage or forisfamiliaried of a child.

I am not aware of any subsequent case in which the decision of Proudfoot, J., has been questioned, except perhaps by the present Chancellor in *In re Miller* (1909), 19 O.L.R. 381, who said he doubted the value of the decisions on which Proudfoot, J., proceeded, as regarded in the light of later decisions, and added: “The law now seems to be that an annual sum or a provision for maintenance and education is not to be limited to unmarried children. Those married may share if the need exists: *In re Booth*, [1894] 2 Ch. 282. *Cook v. Noble* was decided in 1886. *Frewen v. Hamilton*, 47 L.J. Ch. 391, decided in 1877, was not cited in *Cook v. Noble*.”

It seems to me, and I say so with great respect, that the Chancellor has overlooked the fact that in *Frewen v. Hamilton* the children were purchasers for valuable consideration; and that fact is emphasised by Malins, V.-C., who said (p. 394):

“This is not under a will, as in the case that was cited of *Bowden v. Laing* (1844), 14 Sim. 113, where maintenance was to be paid to the mother out of her own income, but here the children are purchasers for valuable consideration.”

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It is to be observed also that in that case the provision was for maintenance and education, and that a distinction is made in some of the cases between such a provision and a provision for maintenance only.

We should, I think, adopt the rule laid down in *Cook v. Noble*. The case was decided more than a quarter of a century ago; it is probable that during that period many wills have been drawn relying upon the law being what it was held by Mr. Justice Proudfoot to be; and for that reason, and because, in my opinion, the construction which he placed upon words similar to those which were used by the testator in this case, having regard to conditions and the mode of life in this country, gives effect to what a testator who has used such language to express his wishes really meant, that construction should be adopted.

The next question is as to the rights of the sons when they have reached the age of thirty years.

The will provides as follows: “I direct my said trustees to pay to each of my sons who shall reach the age of thirty years a sum equal to half that portion of my estate to which such son is entitled under this my will upon the death of his mother, such portion to be valued at the time of each son attaining his thirtieth year, the valuation to be made by my executors and trustees and shall be final. Such payment to be considered as a loan from the estate.”

In order to understand the effect of this provision it is necessary to see what provision is made as to what the sons shall be entitled to at the death of their mother, and that is to be found in the following provision of the will: “Upon the death or remarriage of my said wife I give devise and bequeath all the rest and residue of my estate not hereinbefore specifically disposed of, to my said children, share and share alike, and I direct my said trustees to pay to each of my said children upon his or her attaining the age of twenty-one years his or her share of my estate, deducting, however, therefrom any sum or sums which

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shall already have been advanced to such child, and in the event of any of my said children predeceasing my said wife without leaving lawful issue him or them surviving, then his her or their share or shares shall be divided equally between my surviving children who shall attain the age of twenty-one years, but in the event of my said children who shall so predecease my said wife leaving him or them surviving lawful issue then I direct that such issue shall stand in the place of and be entitled to the share of the parent so deceased."

It was argued on behalf of the sons who have attained the age of thirty years that they are entitled to be paid a sum equal to half the value of the share of the estate to which they would become entitled, in the event of their being then living, on the death or re-marriage of the wife, and that they are entitled to be paid that sum without being required to give security for it and without any obligation to pay interest upon it.

It was argued on behalf of the widow and those of the children who take the same ground as she does that the right of the sons under this provision is by the codicil postponed until ten years from the date of the testator's death, or at all events is so postponed except as to the personalty and the proceeds of such of the lands as the executors and trustees may in their discretion determine to sell and do sell, and that the sons are not entitled to any payment unless upon giving satisfactory security for the amount they receive and for the payment of interest upon it until they become entitled to their shares of the estate.

The provision of the codicil which is relied on is the following:—

"10. I hereby further direct that my real property shall not be divided among the beneficiaries as directed by my will until after the lapse of ten years from my death, and I further direct that the business of managing my real estate shall be carried on by my sons as it has been carried on heretofore, and I direct that my sons shall receive such salaries as shall seem just in the discretion of my executors in remuneration for their services."

It appears that between the date of the will and the making of the codicil the testator had become the owner of a large num-

ber of house and other properties—between 300 and 400 of them—and that these form practically the whole of the estate that will be left after payment of the funeral and testamentary expenses, the succession duties, and the debts other than those which are secured by mortgages on the lands, which amount to a very large sum.

The solution of the question for decision is surrounded with difficulties. If a son who attains the age of thirty years is entitled to be paid a sum equal to one-half of his prospective share, without being required to give security or to pay interest, the result will be that the widow's income will be reduced by so much of it as would have been derived from the investment of what is paid to him, and it may be that a son who ultimately is not entitled to a share of the estate because he has predeceased his mother may leave nothing after him which can be made available to repay what has been advanced.

After much consideration, I have come to the conclusion that the effect of paragraph 10 of the codicil is to postpone the right under the will of the sons who attain the age of thirty to be paid the one-half of their shares, except in so far as it may be practicable to make payments to them out of the personalty and the proceeds of such of the real property as the trustees may have sold.

It is reasonably clear that the intention of the testator was that, as far as it should be practicable to do so, his lands should be retained in specie and should be managed by his sons, and that the division of his estate, as far as it consisted of real property, which was to have taken place upon the death or re-marriage of his wife, should be postponed, if either of these events should happen within ten years after his death, until the expiration of that period; and that, I think, is the effect of the provisions of paragraph 10 of the codicil. If I am right in that view, it follows, I think, that the direction of the will as to the payment to the sons is inconsistent with it, and is *pro tanto* revoked; and that that would be the result apart from the provisions of paragraph 14 of the codicil, which directs that anything in the will which is at variance with the provisions of the codicil "shall be subservient and subject" to the codicil.

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It follows also that the executors and trustees are not bound to convert any of the real estate for the purpose of making payments to the sons, and I do not think that they would be justified in converting it unless perhaps it was prudent to do so to prevent loss by depreciation of the property, or if it should be necessary to convert to pay incumbrances or debts.

If there should be money available for making payments to the sons, I do not think that they can be required to give security for what they may receive, or to pay interest upon it. The direction that what they receive is to be considered as a loan from the estate, coupled with the provision for the deduction, upon the ultimate distribution of the estate, from the share of any child to whom advances shall have been made, of the amount of the advances, was intended to make it clear that a son who received any money under the direction as to payments to sons who attain the age of thirty years, should not, in addition, receive a full share of the residue to be divided, when the division came to be made.

This consideration, and the absence of anything being said as to the loan bearing interest, or of an addition of interest to the sum to be deducted from the share, lead me to the conclusion that interest is not payable on the sum which a son may receive, and that he cannot be required, as a condition of making a payment to him, to give security for it.

It is true that the effect of this view being given effect to will be to reduce the amount of the income which the widow will receive, but that is a result which follows from the dispositions the testator has made, and there is no help for it. It may well be, I think, that the testator, when he made the codicil, had in view that this would be the result of the provisions he had made by his will, and that one of his objects in providing that there should be no division of his real property for ten years after his death was to prevent that from happening, by keeping his real estate, from which the bulk of income would be derived, intact for that period.

I express no opinion as to whether what I have said as to the duty of the trustees as to converting the real estate is applicable to the payments to the daughters on their marriage, because that question was not argued.

It was not proper, I think, upon the motion before my brother Middleton, to direct the inquiry which he directed to be made as to an allowance for maintenance to the children. It will be time enough after the true construction of the will and codicil has been determined, if any child thinks that the discretion of the widow has not been exercised in good faith, and that he is prejudicially affected, to take such steps as he may be advised to enforce any right he may claim to have to the intervention of the Court; and it would be most unjust to the widow to make any such direction as has been made until she, with the knowledge that as the result of the litigation she will have obtained as to her rights and duties, has failed to perform any duty which may rest upon her.

It will be seen from a perusal of the reasons for judgment of my brother Middleton and the formal judgment which has been entered that I do not differ from him except upon some points which are probably of secondary importance.

I do not differ from him as to the rights of the widow and the children in respect of the annual income of the estate, except in two particulars. In my learned brother's view, the discretion which the widow is entitled to exercise as to the application of the income to the maintenance of the children is limited to deciding what amount shall be applied for the maintenance of each child, and that she is not entitled to exercise a discretion as to whether or not a child needs or should receive an allowance for maintenance; while I am of opinion that she is entitled to exercise her discretion both as to whether a child needs and ought to receive an allowance for maintenance and as to the amount of the allowance, if she deems the case one in which an allowance should be made; and that her discretion, if honestly exercised, is not open to review or to be overridden because a Court may happen to take a view which differs from hers.

The other matter as to which we differ is as to the children whose claims for an allowance for their maintenance it is her duty to consider. As I understand my learned brother's reasons for judgment, a child who has left the parental home and is living away from it has a right to have his claim considered and dealt with by his mother; while I am of opinion that he is not so

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entitled, and that a child who is forisfamiliaried or has married has no such right; and I would vary the judgment by adding to it a declaration to that effect.

As already intimated, I do not think that the inquiry which has been directed by the 3rd paragraph of the judgment should have been directed. By paragraph 3 it is ordered that it be referred to the Master in Ordinary to inquire whether any and if so what allowance for maintenance should be made to each of the children of the said Jacob Singer out of the income of the estate.

As I have said, an inquiry of that nature should not be directed until after the rights of the parties have been finally determined, and the widow has then had an opportunity of exercising her discretion, when any child who is entitled to have his claim considered by the widow, if he is able to establish that the widow has not honestly exercised her discretion, will be in a position, in a proper proceeding, to seek the intervention of the Court for the redress of any wrong he may have suffered.

I would also add to the 4th paragraph of the judgment a declaration that the executors and trustees are not bound to convert any part of the real estate for the purpose of making payments to the sons who have attained the age of thirty years, and ought not to do so merely for that purpose.

For these reasons, I would vary the judgment in the manner I have indicated, and I would strike out the 9th paragraph of it, which provides for the disposition of the costs of the reference directed by the 3rd paragraph; and, with these variations, I would affirm the judgment and make the same order as to the costs of the appeal as is made by it as to the costs of the motion.

MACLAREN, J.A.:—I agree.

MAGEE, J.A.:—The testator's will of the 16th May, 1904, stated shortly if inexactly, gave his real and personal estate to his executors in trust with full powers to sell or mortgage, and, after certain pecuniary legacies, directed his business to be continued and the profits paid to his wife during widowhood and the net income of the residue of his estate to be paid her during widowhood, for the maintenance of herself and the

children, and, on her death or re-marriage, the whole estate was given to the children share and share alike, the trustees being directed to pay each child upon attaining the age of twenty-one years his or her share, deducting any sum or sums already advanced to such child; the issue of any child dying before the mother taking such deceased child's share; or, if no issue, such deceased child's share going over to the survivors; but the trustees were directed, as each daughter married with her mother's consent, to settle on her a sum of \$6,000 and pay her \$1,000, and as each son attained the age of thirty years to pay him a sum equal to one-half of his prospective share—to be valued at the time he attained that age—such sum to be considered as a loan.

The will was made in 1904, when the testator's wife was about fifty-two years of age. He had three daughters, the two youngest being respectively twenty-one and seven years old, and nine sons, of whom the oldest was twenty-nine or thirty years old, and five were under twenty-one years, the youngest being twelve. Had no codicil been made, I apprehend that each son, on attaining the age of thirty years, would have been entitled to receive the sum directed to be then paid him, just as clearly as each daughter would have been entitled to her \$7,000 on being married. It would have been the duty equally of the trustees to raise the money, whether for son or daughter, by exercise of the powers to sell or mortgage which were given to them; and, if delay occurred in raising it, the son or daughter would have been entitled to interest on the amount during the delay.

One question here is, whether this right of the sons has been interfered with by the codicil, made seven years later, directing that "my real property shall not be divided among the beneficiaries as directed by my will until after the lapse of ten years from my death." The state of affairs at the date of the codicil, the 31st October, 1911, was practically the same as at the testator's death on the 11th November, 1911. His wife was then fifty-nine years old. Two of his daughters were married, and the other was a girl of fourteen. Of his nine sons, four or five were married, five were under thirty years of age, the youngest being a minor aged nineteen. The testator had, a few years previously, discontinued the business the profits of which were under the will

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to go to the wife during widowhood. That discontinuance would increase the income from the general residuary estate. If with the business capital he increased his real estate it did not lessen the personalty available for payments, inasmuch as under the will the capital was specifically tied up for the wife's sole benefit.

The realty (apparently including some leaseholds) was valued—not probably too highly—at about \$800,000, and included over 300 houses of various sorts; but there were mortgages existing against it amounting to about \$310,000. He owed his bankers and others in all about \$30,000, but he held mortgages to about \$37,000, and shares, life insurance, and accrued rents to about \$10,000. The pecuniary legacies given by will and codicil outside of his children were about \$8,200. There would be expenses and succession duty to pay. The war, which is said to have caused some depression in the real estate market, was then unthought of, and no depression at that time is shewn.

Each of the twelve children might look forward to receiving say \$40,000 or more in the event of the mother's marriage or death. For the purposes of the advance to the sons, such portion was "to be valued at the time of each son attaining his thirtieth year." This valuation of a reversionary interest might not, in the case of some of the sons, amount to more than half of the prospective \$40,000. In the case of the youngest, who would not attain thirty years till his mother would be seventy, the valuation would of course then be greater. Thus the total amount of the advances to sons called for by the will would be much less than one-half of the ultimate values of their several shares, and would be spread over a period of eleven years from the date of the codicil. It would not, therefore, involve undue sacrifice of property or the borrowing of unduly large amounts at one time. I cannot see that any of these payments to individual children at different successive periods could be considered, or are likely to have been by the testator considered, as a division of his real estate. The only division indicated by the will is that which would occur on the death or re-marriage of the testator's wife, and this division it is, and this alone, which, in my opinion, the testator postpones for ten years from his death.

That this is more likely may appear from another consideration. When his will was made, it directed that each child should receive payment on attaining twenty-one years. Six of his children were minors, the youngest being only seven years old. In the natural course of things, then, several years would have elapsed before his estate could be all distributed. In 1911, when he made the codicil, only one son and one daughter were minors, and this may have induced him to fix the ten years as the minimum time to elapse before the division. There is nothing to shew that the condition of the land market would render it more advisable in 1911 than in 1904. Nor are there any other circumstances or any provisions in the will or codicil which, so far as I can see, render it necessary to give to the word "divided" a meaning other than that which seems to be the only obvious one. Bearing in mind that his estate available for his children was practically all real estate, it seems to me very unlikely that, desirous as he was that his sons should have some capital on attaining the age of thirty, he should leave them without any source from which it could be got, during a further period of ten years or less. I would therefore construe the codicil as not interfering with the provision in the will for payment by way of loan to the sons on attaining the age of thirty years.

In other respects I agree with the conclusions of my Lord the Chief Justice.

HODGINS, J.A.:—I agree with the judgment of my Lord the Chief Justice.

The only difficulty to my mind is created by the direction to pay to each of the sons who reach the age of thirty "a sum equal to half that portion of the estate to which such son is entitled under this my will," upon the death of his mother; having regard to the terms of the codicil, which directs that the real property is not to be divided among the beneficiaries as directed by the will until after the lapse of ten years from the testator's death.

It is to be observed that in the codicil the postponement of the division of the real property relates to some division directed by the will, and, on looking at the will, that division is to occur

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upon the death or re-marriage of the wife, when and as each of the children attain twenty-one years of age. The direction to the trustees is to pay the share of the estate to the beneficiaries, just as in the clause firstly referred to the direction is to pay a sum equal to half the sons' share.

I think, judging from the language of the will and codicil, that it must have been intended by the testator to postpone the division as directed by the will, in so far as that involved the real estate, which might be taken by the beneficiaries in specie, if they all consented. The managing of the real estate and the direction that the sons shall receive such salaries as shall seem just in the discretion of the executors, and the fact that the amount of the share is to be ascertained by a valuation, a term properly applied to real estate, would seem to enforce this view.

Under the circumstances, I think that the conclusion come to by my Lord the Chief Justice upon this branch of the case is more nearly in accordance with what the testator intended than any other view which has been suggested.

Judgment below varied.

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[APPELLATE DIVISION.]

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April 26.

Limitation of Actions—Possession of Land—Tenancy at Will—Statutory Title—Limitations Act, R.S.O. 1914, ch. 75, sec. 6, sub-secs. 6, 7—Payment of Taxes to Municipal Authority—Parol Agreement—Payment as Rent—Acknowledgment—Outstanding Title of Mortgagee—Conveyance Absolute in Form Treated as Mortgage—Sec. 23 of Act.

The plaintiff's husband acquired the land in question in 1889; in December, 1892, he conveyed it to D., by a deed absolute in form, but intended only as security for a sum due to D.; and the paper title so continued until October, 1913, when the executors of D. conveyed it to the plaintiff. The defendant, the owner of adjoining land, entered upon the land in question early in 1896, and from that time until the commencement of this action, in 1914, he used the land in question, without interruption or interference, as a part of his own land and garden, changing some of the fences, and building a chicken-house thereon. From the time of his entry until about 1909, he paid the taxes charged upon it to the municipal authority. An oral agreement was made between the plaintiff and defendant in 1896 that the defendant should have the use of the land until a purchaser was found, he to pay the taxes, as rent, in the meantime. No other rent was bargained for or agreed to be paid, and none was paid. The plaintiff sought to eject the defendant, and the defendant pleaded the Limitations Act:—

Held, that the defendant was at the beginning, as the result of the agreement, a mere tenant at will; and nothing was shewn to have subsequently occurred to alter or enlarge his title.

The practical result would be the same if the tenancy was or subsequently became a tenancy for a year, or from year to year, the lease having been by parol.

To a tenancy at will sec. 6, sub-sec. 7, of the Limitations Act, R.S.O. 1914, ch. 75, would apply to bar the plaintiff's right of re-entry at the expiration of ten years from one year after the creation of the tenancy. In sub-sec. 7 nothing is said about the effect upon the operation of the statute of the payment; but the law attributes to the payment of rent in the case of a tenancy at will the effect of a similar payment of rent under sub-sec. 6.

Day v. Day (1871), L.R. 3 P.C. 751, applied and followed.

And *held*, that, as there was an express agreement by the defendant to pay the taxes as rent, no other rent having been stipulated for, the amounts so paid were really paid as rent within the meaning of the statute—the payment amounted unequivocally to an acknowledgment of the plaintiff's title—and so prevented the statutory bar from accruing.

Finch v. Gilray (1889), 16 A.R. 484, distinguished.

Held, also, that D. was in the same position as a mortgagee, and, while his title was outstanding and payments being made, the statute was inoperative against him or any person claiming under him: sec. 23.

Noble v. Noble (1912), 27 O.L.R. 342, distinguished.

Held, therefore, that the defence failed, and the plaintiff should recover possession.

Judgment of KELLY, J., reversed.

AN action for the recovery of land, tried by KELLY, J., without a jury, at Toronto.

N. W. Rowell, K.C., and George Kerr, for the plaintiff.

J. M. Ferguson and D. J. Coffey, for the defendant.

December 30, 1914. KELLY, J.:—The land which is the subject of this dispute adjoins to the east the defendant's land, on which he has resided since 1895.

The plaintiff's husband, William East, acquired this property by deed in 1889; he says that he then owned the land immediately to the east of it, and that, for five years after he so acquired it, he used it as a garden and lawn and chicken-yard. In December, 1892, William East conveyed the land now in question, with other lands, to his father-in-law, William Dennis—the plaintiff being a party to the conveyance for the purpose of barring her dower. East says that the conveyance was made only by way of security for a sum of \$1,000. So far as is disclosed by his evidence, the paper title so continued until October, 1913, when, by a conveyance of the 15th of that month, the surviving executors of John Dennis conveyed to the plaintiff.

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According to the evidence of the plaintiff and her husband, in the spring of 1896 an interview took place between the plaintiff's husband and the defendant about this property—the plaintiff being present. William East says that the defendant wished to rent this property, and that he (East) wished to sell. Both the plaintiff and her husband say that it was then agreed with the defendant that he should have the use of the land for payment of the taxes as rent, and that the plaintiff's husband would send the defendant the tax-bills each year. The defendant denies that any such interview took place. As between him and William East, I should have difficulty in deciding; but the plaintiff's evidence on that point impressed me, and I accept it as correctly setting forth what took place.

In view of the defendant's evidence as to whence the tax-bills came to him and the manner of his making the payments, as well as from what can be deduced from the tax-bills and receipts, I find it difficult to accept East's statement that for the several years mentioned by him he sent the tax-bills to the defendant. Down to 1908, inclusive, the taxes did not belong to the City of Toronto, the property until that time not being within the city limits.

The defendant entered upon the land early in 1896, and from that time until the commencement of this action, without interruption or interference, he used it as a part of his land and garden, changing some of the fences, and building a chicken-house thereon. From the time of his entry until about 1909, he paid the taxes charged upon it; from that time, the plaintiff's husband says he paid them.

If there was any estate created by the arrangement made between these parties, it could not have been more or otherwise than a tenancy at will. This is borne out by the effect of East's statement of what took place when the arrangement was made, namely, that he (East) would send the defendant the tax-bills each year, and if he got a purchaser he would sell.

The strength of the defendant's position lies in the fact that there was no other rent bargained for or agreed to be paid but the taxes, which were not, however, nor was their equivalent, to

be paid to the owner, but only to the proper authority entitled to collect them.

A person in the position of the defendant, seeking to retain possession and establish ownership of land, on the sole ground of length of undisputed possession, has no cause for complaint if he be put to strict proof in support of his claim. Even on such a test, I find that the defendant was in adverse possession for more than the time required by the statute, and that he made no such acknowledgment as would take the case out of the statute or give a new starting-point from which possession would run. True, there is some evidence of a conversation or conversations between the plaintiff's husband and the defendant—denied by the defendant—with relation to the property, but not such as to constitute an acknowledgment of ownership.

The plaintiff, and those through whom she claims, outwardly displayed little, if any, interest in the property, such as might have been expected from an owner. She personally knew nothing of its condition from the time the defendant took possession until a few months ago; her husband's activity in that direction went no further than seeing the property about once a year, when it was patent to him that the defendant was in possession. They made no entry upon it and no claim to it. Apparently, at least, they slept on their rights. It may be that they relied upon their arrangement with the defendant as protecting those rights.

The agreement was to pay the taxes—not to pay to the landlord as rent an amount equal to the taxes, or any sum. This brings the case within the authority of *Finch v. Gilray* (1889), 16 A.R. 484, and *Bowman v. Watts* (1909), 13 O.W.R. 481, in the former of which, at p. 492, it is stated that the substantial characteristics of rent are wanting in the case of taxes paid as such by an occupant, and that, even when so paid under an agreement with the landlord, they cannot be regarded as rent. Putting it in the light most favourable to the plaintiff, the time began to run in favour of the defendant not later than 1897—if, indeed, it did not begin in 1896—and the full time required by the statute had run before there was any interruption or claim or entry by or on behalf of the plaintiff.

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I have not disregarded the authorities cited for the plaintiff, which, I think, are quite distinguishable from the present case.

The result is, that the defendant has acquired title to the land; and the action must be dismissed with costs, but with this modification, that the defendant pay to the plaintiff such taxes as the plaintiff or her husband paid, beginning with the time (1909 or thereabouts) from which the husband says he paid them and the defendant admits that *he* did not pay, with interest on the sums so paid from the respective times of payment, the lands to stand as security for such payment. If the parties cannot agree on the amount, the matter may be referred to me.

The plaintiff appealed from the judgment of KELLY, J.

March 16. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

N. W. Rowell, K.C., and George Kerr, for the appellant. There was an express agreement by the defendant to pay the taxes as rent; no other rent was exacted; and the sums paid were paid as rent, within the meaning of the Limitations Act, and the statute never operated in favour of the defendant. *Finch v. Gilray*, 16 A.R. 484, is not applicable when the facts are considered. They referred to and relied on *Dominion Improvement and Development Co. v. Lally* (1911), 24 O.L.R. 115. The property was under mortgage until 1913—that is, it had been conveyed by the plaintiff's husband to her father, Dennis, by a deed absolute in form, which was in reality a mortgage. The executors of Dennis in 1913 reconveyed the land to the plaintiff—her husband consenting. While the mortgagee's title was outstanding and payments being made, the statute was inoperative as against the mortgagee or any person claiming under him: see secs. 23 and 24 of the Limitations Act. The reconveyance gave a new starting-point for the statute. They referred to *Noble v. Noble* (1912), 25 O.L.R. 379, 27 O.L.R. 342, distinguishing it; and also to *Henderson v. Henderson* (1896), 23 A.R. 577; *Ludbrook v. Ludbrook*, [1901] 2 K.B. 96, 100; and *Soper v. City of Windsor* (1914), 32 O.L.R. 352. The deed to Dennis was a mortgage in law: Halsbury's Laws of England, vol. 21, p. 74; Coote on Mortgages, 7th ed., vol. 1, pp. 27, 28.

J. M. Ferguson and *D. J. Coffey*, for the defendant, respondent, referred to and explained the circumstances in which the defendant got possession, and contended that the tenancy, if any, expired at a time early enough to allow of the acquisition of a statutory title. They relied on *Finch v. Gilray, supra*, as completely covering the present case. The fundamental idea expressed in the statute is *acknowledgment*. The payment of taxes to the municipal authority could not be an acknowledgment of the title of another—it was more consistent with ownership. *Coffin v. North American Land Co.* (1891), 21 O.R. 80, is in point, and is not overruled as regards the effect of payment of taxes. There must be payment to a person which shall be equivalent to an acknowledgement. The other point raised by the appellant is a new one. The estate of Dennis was gone before his executors reconveyed. At any rate, the conveyance to Dennis was not a mortgage; he had no higher rights than his grantor.

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April 26. The judgment of the Court was delivered by GARROW, J.A.:—Appeal by the plaintiff from the judgment at the trial of Kelly, J., who dismissed the action. The facts appear in his reasons for judgment.

As will be seen, the judgment proceeds upon the ground that the tenancy created by the agreement that the defendant might occupy the land in question until a purchaser was found, he to pay the taxes in the meantime, as rent, was a tenancy at will. To such a tenancy sec. 6, sub-sec. 7, of the Limitations Act, R.S.O. 1914, ch. 75, would apply to bar the plaintiff's right of re-entry at the expiration of ten years from one year after the creation of the tenancy. The practical result would be the same if it should be held that the tenancy was or subsequently became a tenancy for a year, or from year to year, the lease having been by parol—see sub-sec. 6—the only difference being that under sub-sec. 6 the statutory period begins to run at the end of the first year, “or at the last time when any rent payable in respect of such tenancy was received, whichever last happened,” while in sub-sec. 7 nothing is said about the effect upon the operation of the statute of the payment of rent.

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I agree with Kelly, J., that the proper conclusion is, that the defendant was at the beginning, as the result of the agreement, a mere tenant at will; and, in my opinion, nothing is shewn to have subsequently occurred to alter or enlarge his title.

In *Day v. Day* (1871), L.R. 3 P.C. 751, on an appeal from New South Wales, the question arose upon a section not unlike our sec. 6, sub-sec. 7; and in the judgment, at p. 761, it is said: "When the statute has once begun to run it would seem on principle that it could not cease to run unless the real owner, whom the statute assumes to be dispossessed of the property, shall have been restored to the possession. He may be so restored either by entering on the actual possession of the property, or by receiving rent from the person in the occupation, or by making a new lease to such person, which is accepted by him; and it is not material whether it is a lease for a term of years, from year to year, or at will."

Accepting this as a binding statement of the law, the result seems to be to give to the payment of rent in the case of a tenancy at will the effect of a similar payment of rent under sub-sec. 6, which seems reasonable.

The defendant paid nothing directly to the plaintiff or to her husband. What he did pay was the taxes, which he paid each year to the municipal officials. The plaintiff contends that, as there was an express agreement by the defendant to pay the taxes as rent, no other rent having been stipulated for, the amounts so paid were really paid as rent within the meaning of the statute, and so prevented the statutory bar from accruing. And the learned counsel for the plaintiff distinguished the case in this Court of *Finch v. Gilray*, 16 A.R. 484, referred to and followed by Kelly, J., in which it was held, overruling a Divisional Court, that in a lease providing for the payment of a sum by way of rent and a further sum by way of taxes the payment of the latter alone did not prevent the operation of the statute. Burton, J.A., at p. 488, however, expressed the opinion that the payment of a sum equivalent to the taxes would have been sufficient as a reservation of rent directly to the landlord. And a similar opinion was apparently expressed by Osler, J.A., at p. 493. But both learned Judges seemed to regard the payment of

taxes, under a lease which also provided for the payment of rent, as something quite collateral or in addition to the rent, and therefore not "rent" within the meaning of that term as used in the statute. MacLennan, J.A., expressly, in the beginning of his judgment, limited his remarks to the actual case before him, namely, that of an agreement to pay the taxes, as well as, in addition, a certain sum for rent (pp. 494, 495). He then proceeds: "It cannot fairly be said that, by the express terms of the agreement, the taxes were to be paid as so much additional rent. The parties, no doubt, could have agreed to that, but I think it is not proved that they did so in this case." The learned Judge then referred to the Assessment Act, saying: "In my judgment, the tenant in this case must be regarded as having paid his taxes in discharge of his legal obligation to the municipality, and I think it is impossible for any purpose to regard it as rent received by the landlord, as an acknowledgment of title" (p. 497).

Whatever application the learned Judge's remarks concerning the Assessment Act had to the facts in that case—an application which, with the greatest respect, is to me not at present clear—they can, I think, have no application in this case. The defendant's obligation to pay the taxes only arose upon his being placed in possession under the agreement with the plaintiff's husband, and under that agreement the defendant expressly agreed to pay the taxes, not merely as taxes but as rent, and the only rent to be paid for the use of the land. And in paying the taxes he was therefore, primarily at least, performing his part of the agreement, and the circumstance that in so doing he was also discharging an obligation incidentally imposed by the assessment law upon both tenant and owner seems to me to be of no consequence. It would, of course, be otherwise but for the agreement, for it may well be conceded that the mere payment of taxes by an occupant of land would not in itself be an acknowledgment of title or prevent the operation of the statute. And, giving full effect to the decision upon the facts in *Finch v. Gilray*, that the same result would follow where there is a specific reservation of another and different sum as rent, I am quite unable to see why, where no other sum is

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reserved, the parties may not lawfully agree that the tenant shall pay the taxes as rent, nor why the sum so agreed to be paid and paid should not for all purposes be regarded as rent. A contrary conclusion could not, I think, safely rest upon the circumstance that the payments were not to be made directly to the plaintiff but to the assessment officials. The taxes were a charge not merely upon the occupant, but also upon the landlord and his land, under which, in addition to other remedies, if the taxes remained unpaid, the land itself could be sold. If the agreement had been to pay the amount of the taxes into the plaintiff's bank, or to a dependent relative, or a creditor, no one would, I think, suggest that such a payment was not the equivalent for all purposes of a payment directly to the landlord. And I am quite unable to see a substantial difference between the cases so supposed and this.

The real question, it seems to me, is, was the payment made under circumstances which amounted unequivocally to an acknowledgment of the plaintiff's title; and, having regard to the agreement between the parties, of that there ought to be no reasonable doubt in this case.

I am, therefore, upon the whole, of the opinion that the contention of the plaintiff's counsel that this case does not fall within the decision in *Finch v. Gilray* is well-founded; and that, consequently, the plaintiff ought to succeed in this appeal.

A new point was raised on the hearing before us to which I should perhaps briefly refer, namely, that the conveyance from the plaintiff's husband to William Dennis, the plaintiff's father, although absolute in form, was in fact intended to be a mortgage given to secure a loan of \$1,000 by William Dennis to the husband upon which the husband paid the interest for many years, and also a part of the principal. After the death of William Dennis, his executors, on the 15th October, 1913, conveyed the land to the plaintiff—the husband, the mortgagor, consenting. And it is contended that, while the mortgagee's title was outstanding and payments being made, the statute was inoperative as against the mortgagee or any person claiming under him. See sec. 23. That result would, of course, clearly

follow if the conveyance had been in form a mortgage. And I am not able to see a good reason why, where the fact is admitted or is established, as it is here by the evidence, it should not also be so in such a case as this. The defendant has no merits. He is seeking to obtain, under cover of the statute, what would not otherwise belong to him; and we are not, in such circumstances, in my opinion, called upon to be astute to find reasons for assisting him.

The case is easily, I think, distinguished from the case recently before us of *Noble v. Noble*, 27 O.L.R. 342. In that case a mortgagor, after his title had been extinguished under the provisions of the statute, paid off the mortgage and obtained and registered an ordinary statutory discharge, and the question was as to the effect which ought to be attributed to such a discharge under such circumstances. The majority of the Court held that the proper effect was to regard the discharge as enuring to the benefit of the person or persons then best entitled in law to the land, and not as giving to the plaintiff, who had lost his title, a new starting-point under the statute as a person claiming under the mortgagee. The conveyancing here, however, is of quite a different character. The plaintiff obtained her conveyance, which is an ordinary deed in fee simple, directly from the legal representatives of the deceased mortgagee. The conveyance was so made, it is said, by and with the consent of her husband, the mortgagor; but that cannot, I think, affect the legal result, which is, in my opinion, to entitle her to say that she claims under the mortgage within the meaning of the cases referred to in *Noble v. Noble*, at p. 347.

For these reasons, I would allow the appeal and direct judgment to be entered for the plaintiff for the recovery of the land in question. And the defendant should pay the costs throughout.

Appeal allowed.

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JONES V. TOWNSHIP OF TUCKERSMITH.

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RE JONES AND TOWNSHIP OF TUCKERSMITH.

April 26.

Highway—Municipal By-law Authorising Closing and Sale of Unopened Street as Shewn on Plan—Registration of Plan—Sale of Lots Fronting on Street—Surveys Act, 1 Geo. V. ch. 42, sec. 44—Municipal Act, 1903, secs. 601, 607, 637 (1)—Effect of Exemption of Township Corporation from Obligation to Keep in Repair—Easements—Effect of Non-user—Public and Private Interests—Bona Fides—Exclusion of Land-owners from Access to Lands—Municipal Act, sec. 629 (1)—Sale by Council without Offering to Abutting Owners—Sec. 640 (11) of Act—Quashing Part of By-law.

The owner of a farm lot in the township registered a plan of survey of part of it, on the 13th August, 1873. On the plan were shewn 5 streets, one of which was M. street, and 32 lots, 16 of which abutted on M. street. These 16 lots were sold, and at the time of the action were still owned by those who purchased them or by persons who derived title from the purchasers; but M. street was never used as a street, and was fenced in with the remaining part of the farm and occupied ever since by the person for whom the survey was made and those claiming under him. On the 13th January, 1913, the township council passed a by-law closing a part of M. street and authorising the sale and conveyance of the part closed to the highest bidder. A sale and conveyance were made to the defendant K. The by-law and the sale and conveyance were attacked by the plaintiffs:—

Held, that, under sec. 44 of the Surveys Act, 1 Geo. V. ch. 42, which was the Act in force when the by-law was passed, M. street was a public highway, having become such in 1897, when the original of sec. 44 was, by 60 Viet. ch. 27, sec. 20, made to extend to townships; and the township council had jurisdiction over it, it being, by force of sec. 601 of the Municipal Act, 1903, vested in the township corporation; and, under sec. 637 (1), the council had power to pass a by-law for stopping it up. The provision of sec. 607 of the Municipal Act, 1903, exempting a municipal corporation from the obligation to keep in repair a street or road laid out by a private person until established or assumed by the corporation does not take away from such a street, until established or assumed, the character of a public highway.

Gooderham v. City of Toronto (1895), 25 S.C.R. 246, explained and distinguished.

Roche v. Ryan (1892), 22 O.R. 107, approved.

Held, also, that the purchasers of lots fronting on M. street and their assigns had not lost their rights or easements over that street: mere non-user is not of itself abandonment, although it is evidence with reference to an abandonment.

Review of the authorities.

Held, also, that the evidence did not warrant the quashing of the by-law on the ground that it was not passed in the public interest, but in the interest of the defendant K.—there was nothing to suggest that the council or any member of it acted in bad faith, that is, under colour of an intention to serve the public interest, but in reality for the sole purpose of benefiting K.

United Buildings Corporation v. Corporation of the City of Vancouver, [1915] A.C. 345, applied.

What is or is not in the public interest, in a case such as this, is a matter to be determined by the judgment of the municipal council; and what

it determines, if in reaching its conclusion the council act honestly and within the limits of its powers, is not open to review by any Court.

Held, also, that the plaintiffs were not, by the closing of M. street, excluded from ingress and egress to and from their land; and the effect of the by-law, so far as they were concerned, would not be to contravene the provisions of sub-sec. 1 of sec. 629 of the Municipal Act, 1903.

In re McArthur and Township of Southwold (1878), 3 A.R. 295, followed. But *held*, that the by-law was open to the objection that the council had no authority to sell the *situs* of the road without first offering it to the abutting owners at a price fixed by the council; it is only in the event of the abutting owners declining to purchase that authority is given to sell to any one else, and then authority is given to sell at that price or a greater one: sec. 640, sub-sec. 11, of the Municipal Act, 1903.

Cameron v. Wait (1878), 3 A.R. 175, 180, distinguished.

Sub-section 11 is applicable whether the by-law is based upon it or upon sub-sec. 1 of sec. 637; and, while the sections are permissive in the sense that it is optional with the council to sell or not to sell, the council, if it determines to sell, is bound to sell in the manner prescribed by sub-sec. 11.

The section of the by-law authorising the sale and conveyance of the *situs* of the street was quashed, and the conveyance to the defendant K. was set aside and the registration of it vacated.

Judgment of LATCHFORD, J., varied.

ACTION to set aside a by-law passed on the 13th January, 1913, by the Council of the Township of Tuckersmith, providing for the closing up of a portion of Mill street, in the village of Egmondville, in the said township, and authorising the sale and conveyance of the portion of the road so closed, and to set aside a sale and conveyance made by the township corporation to the defendants Kruse and Berry; also a summary application, under the provisions of the Municipal Act, for an order quashing the by-law.

September 30, 1914. The action was tried and the motion heard by LATCHFORD, J., without a jury, at Stratford.

W. Proudfoot, K.C., for the plaintiffs.

R. S. Robertson and R. S. Hays, for the defendants.

December 30, 1914. LATCHFORD, J.:—This action came before me for trial at Stratford on the 30th September, in combination with a motion to quash a by-law of the defendant municipality, renewed pursuant to leave granted by the judgment of the Second Divisional Court of the Appellate Division, 6 O.W.N. 379, setting aside the order quashing the same by-law made by Middleton, J., 25 O.W.R. 680, 5 O.W.N. 759. The evidence then given was recently supplemented at Toronto; and all the evid-

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ence was, by consent of the parties, regarded as applying to the motion as well as to the action.

Little was added at the trial to the facts disclosed in the material before my learned brother Middleton when he quashed the by-law. I accept unreservedly the findings of fact stated in his judgment.

It seems to me beyond doubt that the by-law of 1875 had reference to the plan of 1857, which was the *original* plan, and not to the plan of 1873. It is to Mill street and Water street, "as shewn on the original plan," that the by-law refers. Mill street, according to that plan, did not extend north of Queen street, and the by-law of 1875 cannot be relied on as an acceptance of the extension of Mill street shewn on the plan of 1873 and now in question. There was no evidence before me establishing that the dedication of Mill street north of Queen street was ever adopted by the municipality, or that it was ever in actual use as a public street or highway.

It is urged, however, that Mill street north of Queen street became a public highway by sec. 44 of the Surveys Act, 1 Geo. V. ch. 42, R.S.O. 1914, ch. 166, which, so far as material, is as follows: "Subject to the provisions of *the Registry Act*, as to the amendment or alteration of plans, all allowances for . . . streets . . . surveyed . . . in a . . . township . . . which have been or may be surveyed and laid out by companies or individuals and laid down on the plans thereof, and upon which lots fronting on or adjoining such allowances for . . . streets . . . have been or may be hereafter sold to purchasers, shall be public . . . streets. . . ."

The application of this section to townships is first found in 60 Vict. ch. 27, sec. 20; but the enactment is plainly retroactive, and has been so held: *McGregor v. Village of Watford* (1906), 13 O.L.R. 10. *Gooderham v. City of Toronto* (1895), 25 S.C.R. 246, is not authority to the contrary. The statute as it now exists differs materially from the provisions then under consideration. See the judgment of Gwynne, J., at p. 259.

The allowance for Mill street north of Queen street was "surveyed" and "laid out" and "laid down" on the plan of

1873, and "lots fronting on" and "adjoining" such street "were sold to purchasers."

The plan of 1873 was filed by L. O. Van Egmond. It did not include his land east of Mill street. At his death in 1904, the land passed by will to his executors and trustees, the survivor of whom, his daughter, Margaret Charlesworth, conveyed it in 1908 to her son, W. G. Charlesworth. The description in this conveyance covers an irregular parcel of 68 acres, "except certain village lots on the east side of Centre street and the west side of Mill street heretofore sold and conveyed off the said lands."

L. O. Van Egmond had at various times sold and conveyed to purchasers, including John Sproat, from whom the plaintiff derives title, lots abutting and fronting on Mill street. For instance, in 1899, he conveyed lots 31, 32, and 33 on the west side of Mill street to one Collie. Lot 31 had also a front on Victoria street, but the other lots could only be approached from Mill street or across lot 31. Sproat owned a block of four lots, Nos. 37 to 40. The plaintiff purchased lot 40 on the west side of Mill street prior to the passing of the by-law now attacked, though, owing to delays accounted for satisfactorily, the conveyance was not completed until after the by-law was passed. Lot 40 fronts and abuts on Mill street as shewn on the plan of 1873, and cannot be reached except from that part of Mill street closed by the by-law.

In 1911, W. G. Charlesworth conveyed to James R. Berry the lands purchased from his mother. In this deed the exception is repeated of the lots on the east side of Centre street and the west side of Mill street. The grantor in his affidavit filed in support of the motion to quash deposes that he informed Berry that Mill street might be opened up at any time. Berry subsequently conveyed to the defendant Kruse part of the lands acquired from Charlesworth. It is not disputed that the north end of Mill street, in question in these proceedings, was always fenced in and used as part of the Van Egmond farm, now owned by the defendant Kruse.

At the trial an effort was made to establish that Kruse and those—other than the defendant municipality—through whom

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he derived title had, by their continuous occupation of the Van Egmond farm, acquired a possessory title to the unopened end of Mill street. McCaa, who in April, 1893, bought lot 29 on Mill street west, from Van Egmond, deposed, subject to objection, that he signed at the same time an agreement in writing that he was to have no rights whatever in Mill street. The writing was not produced, nor was its absence properly accounted for. But, on other grounds also, I consider that the evidence ought to be rejected. It is opposed to the terms of the deed, although no direct testimony in contradiction is available. Van Egmond being dead, I decline to credit the uncorroborated statement of McCaa. He impressed me as one giving evidence that was the result of suggestion rather than memory. Moreover, Mr. Charlesworth stated that his grandfather's idea, as he understood it, was that Mill street was to be opened up. This is consistent with the facts mentioned, that L. O. Van Egmond had sold many lots fronting on Mill street, and that such lots were expressly excepted from the conveyance to W. G. Charlesworth, and the conveyance from him to Berry, under whom Kruse claims the farm and the street as part of the farm. The Charlesworths never claimed title to Mill street.

Van Egmond, subsequent to the filing of the plan of 1873, could not assert, as against any purchaser to whom he sold lots on Mill street, that he had not dedicated Mill street to public use, and that therefore, so long as the plan remained unamended in accordance with the provisions of the Registry Act, Mill street, throughout the extent shewn on the plan, was, as against him, to be considered a public street which the municipality might at any time accept formally by by-law, or quite as effectively by expending public moneys upon it: *Street, J., in Sklitzsky v. Cranston* (1892), 22 O.R. 590, at p. 594. In reference to the decision in that case, it is to be remembered that sec. 62 of the Surveys Act, R.S.O. 1887, ch. 152, then under consideration, did not apply to plans of parts of townships.

I am of opinion that under sec. 44 of the Surveys Act the part of Mill street in question, as shewn on the plan of 1873, though not opened up or accepted by the municipality, became a public street.

The next question is, was the freehold in that part of the street vested in the municipality?

Mill street north of Queen street clearly does not fall within the definition of a public highway stated in sec. 599 of the Municipal Act of 1903. It is not a road allowance made by a Crown surveyor. It was not laid out by virtue of any statute. No public money had been expended for opening it. No statute labour had been performed upon it, and it had not been altered according to law. It is as to such highways only that the freehold is vested in the Crown by sec. 599. Section 601 is much wider in its scope, and vests in the municipality every public street and highway, including streets which have become public streets under sec. 44 of the Surveys Act; subject, however, to any rights reserved by the person who laid out such street or highway.

In *Roche v. Ryan* (1892), 22 O.R. 107, Mr. Justice Street, referring, at p. 109, to corresponding sections of the Municipal Act of the time—525 and 550 of R.S.O. 1887, ch. 184—says in regard to the conflict of views entertained of the meaning and effect of these sections: “I prefer that which interprets sec. 527 as relating only to roads and streets laid out by private individuals, and treat it as vesting not the surface merely but also the soil and freehold in the municipality.” He concluded, however, that until the municipality accepted the dedication offered by a private owner, as there was an intermediate stage in which the dedication might be revoked and the plan amended with the consent of purchasers of lots fronting on the street, the property in the streets remained in the individual. This opinion was rejected on appeal. Galt, C.J., at p. 115, says: “I consider that when lots have been sold abutting on a street, the property in that street is absolutely vested in the corporation, unless a change in the plan should be made with the consent of the persons to whom the various lots have been sold.”

The right so held to be vested could not pass to the original property-owner when the plan was amended. It was, I think, to obviate this anomaly that the Surveys Act was amended in 1900 by 63 Vict. ch. 17, sec. 22, which added to sec. 39 of R.S.O.

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1897, ch. 181, the provisions now found in sub-sec. 6 of sec. 44 of the Surveys Act.

Now, a street which became a public highway under sub-sec. 1 of sec. 44 because laid down on a plan, but which the corporation has not assumed, is, after being closed *by alteration of the plan* under the provisions of the Registry or other Acts, declared by sub-sec. 6 to belong to the owners of the land abutting thereon.

There has been no alteration of the plan of 1873, and sub-sec. 6 of sec. 44 has no application. Upon the authority of *Roche v. Ryan*, I am bound to hold that, by sec. 601 of the Municipal Act, 1903, the property in Mill street, north of Queen, was, at the time of the passing of the impeached by-law, vested in the defendant township, which therefore was possessed of a "qualified property, to be held and exercised for the benefit of the whole body of the corporation:" *Town of Sarnia v. Great Western R.W. Co.* (1861), 21 U.C.R. 59, at p. 62.

By sec. 637 of the Municipal Act, 1903, the council of any township may pass by-laws for selling streets wholly within the jurisdiction of the council.

Section 632 requires that no by-law be passed for selling any public street until notices of the intended by-law have been posted up in six of the most public places in the immediate neighbourhood of such street, and published weekly for four successive weeks in some newspaper published in the municipality, or, if there is no such newspaper, then in a newspaper published in some neighbouring municipality, nor until the council has heard, in person or by counsel or solicitor, any one whose land might be prejudicially affected thereby, and who petitions to be so heard.

It is argued that under sec. 640, sub-sec. 11, the plaintiff and other owners of lands on the west side of Mill street should have been given the option to purchase the street, and that only upon their refusal to purchase could the street be sold.

Sub-section 11 provides that townships and other councils have power to sell the original road allowance to the persons next adjoining whose lands the same is situated, where a public road, for the site or line of which compensation has been paid,

has been opened in lieu of the original road allowance, and to sell, "in like manner, to the owners of any adjoining land, any road legally stopped up or altered by the council." In case such persons refuse to become the purchasers at such price as the council thinks reasonable, then to sell to any other person for the same or a greater price.

The words "the persons next adjoining whose lands" and "owners" were considered by Street, J., to convey the same idea—that the persons to whom the adjoining lands belong should have the first right to acquire and to add to such lands the accretion formed by the closing up of the highway: *Broun v. Bushey* (1894), 25 O.R. 612, at p. 616.

But sub-sec. 11 seems not to apply except in cases where a new road or street has been opened in lieu of the old: *Cameron v. Wait* (1878), 3 A.R. 175, at p. 180.

The next question is, did the municipality exercise conformably to sec. 632 the power to sell conferred by sec. 637?

On a motion to quash a by-law affecting a public road, the Court, until the contrary is shewn, will presume that the council acted regularly: Robinson, C.J., in *Fisher v. Municipal Council of Vaughan* (1853), 10 U.C.R. 492.

The notices were given as prescribed by the statute. They set forth that at a meeting to be held on a date stated, it was the intention of the council to consider, and, if thought advisable, to pass, a by-law closing up and disposing of that portion of Mill street lying north of the intersection of Queen street.

In 1906, an application had been made for the opening out of Mill street for its full length, but no action was taken by the council.

At a meeting of the council on the 17th February, 1912, a largely signed petition for the opening of Mill street had been supported by the appearance before the council of a number of the persons interested. A petition against the opening of Mill street prepared by Mr. R. S. Hays, solicitor, and signed by James Berry and others, is in evidence. It is dated the 1st January, 1912, and was probably presented at the meeting held on that date.

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On motion of William Berry, a brother of James Berry, who had purchased the lands east of Mill street from Charlesworth in February, 1911, the council decided to take no action.

Then came, on the 16th November, 1912, Kruse's application to purchase the street for use as a brickyard.

The name of William Berry appears as seconder of the motion to grant Kruse's request and to employ Mr. R. S. Hays as solicitor for the township. Mr. Hays was undoubtedly known to be acting at the time for Kruse.

The council heard, at the meeting of the 23rd December, several of the persons prejudicially affected by the closing and sale of the street. Mr. Hays was present at this meeting in his dual capacity of solicitor for Kruse and solicitor for the township, and advocated the sale. The plaintiff Robinson understood that it had been previously arranged that after the street was closed James Berry was to get one-half of it and Kruse the other. Leopold Van Egmond asked Berry and Kruse at the council meeting if this was not so, and they did not deny that it was.

The only motion adopted was that "no action be taken at this meeting until further consideration of the question be given." But four of the five members constituting the council were present; and one of the four, Mr. John F. McKay, says that their intention—not indeed very happily expressed in the motion—was that action should be deferred until another meeting of the council should be held, attended by all the members.

Those who desired the street opened and opposed the closing and sale of it were not present at the meeting on the 13th January. As it was the first meeting of the new council, the principal business expected to be transacted was organisation for the year. The property-owners, other than Kruse and Berry, had no intimation that the question would be taken up at the first meeting. They assumed that they would receive notice of the meeting at which the matter was to be reconsidered. The personnel of the council had slightly changed. There was present and acting on the 13th January, a new member of the council, who had not heard the grounds of opposition to the sale.

Kruse and Berry and their solicitor—who was still acting for the township—were however there, and the by-law previously prepared by Mr. Hays was pressed through three readings and passed.

It is not, I think, too much to expect that the utmost fairness should characterise a proceeding depriving ratepayers of a right as important as their right of access to property from a street abutting on which they have bought lots. I find that such good faith was not manifested by the council. Their duty was to protect the interest of the ratepayers as a whole against the interest of particular individuals like Kruse and Berry. They should not have employed as their solicitor the solicitor whom they knew to be acting for the two persons who alone desired to purchase the street. Others might object to the opening of the street, but Berry and Kruse were the only persons who desired it closed.

A municipal council is a continuing body under sec. 327 of the Municipal Act, notwithstanding any change made by an intervening election, and the council of 1913 was competent to deal with the question of closing and selling the street. The new member, Mr. Cameron, could, however, exercise no independent judgment regarding the matter; and, though he seconded the motion to pass the by-law, he did so merely at the instance of another member, Mr. John F. McKay, who had throughout been seconding every effort of Berry and Kruse. The latter was known to the reeve and to councillor John F. McKay to be entering into competition with the plaintiff Sproat in manufacturing brick and tile; and McKay cannot but have known that the sale of Mill street, if made as was intended, to Kruse, would, perhaps not immediately, but in the course of time, militate greatly against Sproat, and prejudice at the same time the many other ratepayers who desired the street opened.

The closing of the street is, I think, a violation of sec. 473 of the Municipal Act of 1913. Mill street provided the only means of access to such lots as that owned, at the time the by-law was passed, by such persons as the plaintiff Jones. I do not understand the words “means of access” to express the idea that

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the means of access must actually exist at the time. It seems to me within the scope of the prohibition that the only means of access which may be afforded in the future by a statutory highway existing, though not opened up, shall not, without compensation, be taken from persons whose lots front on such highway. The only cases cited to the contrary have reference to farm lots which have more than one road affording access.

While I do not desire to impute any want of honesty to Mr. Hays, I cannot help observing that he allowed himself to occupy an invidious position. He was acting for Kruse and James Berry, certainly for Kruse, with the knowledge that Kruse intended to divide the street with Berry, as in fact was subsequently done. His interest was to obtain the street for his private client or clients. His duty as solicitor for the council was to protect the interests of the ratepayers generally. He undoubtedly had great influence with the members of the council, several of whom knew that he was anxious to secure the street for Kruse and Berry, and that influence was exerted for the benefit, not of the ratepayers, but of Kruse and Berry. It may be said there is no positive evidence of this. My answer is, that it is plainly to be inferred from facts as to which there is no dispute. A street laid down for forty years which many purchasers of lots fronting on it desired opened, but which only Kruse and Berry were interested in having closed, was closed at the instance of these two men and their solicitor, who was, as stated, at the same time acting as solicitor for the council.

No transaction carried out in this way should, in my opinion, be permitted to stand.

There will, therefore, be upon the motion judgment quashing the by-law with costs, and in the action judgment in favour of the plaintiffs declaring the conveyances from the defendant corporation to the defendant James Berry, and from the latter to his co-defendant Kruse, null and void, and directing that the registration thereof be vacated. Any buildings or obstructions placed by any of the defendants upon Mill street north of Queen are to be removed forthwith.

The plaintiffs are to have their costs of the action and motion.

The defendants appealed from the judgment of LATCHFORD, J.

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March 16 and 17. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, and HODGINS, J.J.A.

R. S. Robertson and *R. S. Hays*, for the appellants.

William Proudfoot, K.C., for the plaintiffs, the respondents.

(The arguments of counsel and the statutes and cases cited are sufficiently referred to in the judgments.)

April 26. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendants in the action, and the respondents to the motion, from the judgment dated the 30th December, 1914, which was directed to be entered by Latchford, J., after the trial of the action and the hearing of the motion before him on the 30th September, 1914.

The action was begun on the 8th September, 1913, and by it the respondents seek to have set aside a by-law passed on the 13th January, 1913, by the council of the appellant corporation, by which it was enacted:—

“(1) That all that portion of Mill street in the . . . village of Egmondville that lies north of the intersection of Queen street with said Mill street be and the same is hereby stopped up and closed.

“(2) That the reeve of this municipality be and he is hereby authorised and instructed, for and on behalf of this corporation, to execute and attach the corporate seal of this corporation to a deed of conveyance of the above-described portion of Mill street to the highest bidder therefor.”

The motion was a motion to quash the by-law, and was launched after the action was begun. The by-law is attacked on the following grounds:—

(1) That it was not passed in the public interest, but to serve the private interest of the appellant Kruse, and in pursuance of a collusive arrangement between him and the appellant corporation that he should become the purchaser of the portion of the street which the by-law purports to close.

(2) That the opponents of the by-law were not afforded an

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opportunity of being heard, although they had applied to be heard in opposition to the by-law.

(3) That the effect of the by-law will be to deprive the respondents of access to their lots over Mill street, and that there was no jurisdiction to pass it without first providing them, and those whose lands adjoin Mill street, with compensation and some other convenient road or way of access to their lots.

And the conveyance to Kruse of the part of the street which is closed by the by-law is attacked on the ground that the sale to him was made without proper notice or publicity, and without giving the respondents "and others interested an opportunity, if they so desired, of bidding on the said land."

The motion came on to be heard before Middleton, J., and he gave judgment quashing the by-law. It appears from the reasons for judgment, *Re Jones and Township of Tuckersmith* (1914), 5 O.W.N. 759, that the ground of the decision was that, as Mill street had not been assumed by the appellant corporation for public use, its council had no jurisdiction "to close and sell it and keep the proceeds." The view of my brother Middleton was, that sec. 637 of the Consolidated Municipal Act, 1903, related only to original allowances for road and other public highways, streets, or lanes; that a road allowance shewn upon a plan, but not assumed by the corporation for public use, did not fall within that designation; and that, although for some purposes it was a highway, it remained, subject to the rights of the public, to be governed by the Surveys Act (1 Geo. V. ch. 42, sec. 44), and might be closed under the provisions of the Registry Act; but that, when it was closed and the public rights were extinguished, it belonged to the abutting owners and not to the corporation.

The order of my brother Middleton was set aside by a Divisional Court, but liberty was given to the respondents to renew the motion before the Judge at the trial of the action, who was not to be bound by the judgment of my learned brother; and it was directed that, if the trial of the action was not proceeded with at the next sittings at which it could be had, the motion to quash might be renewed before a single Judge on such addi-

tional material as the respondents might be advised to bring before the Court, and that if the motion was not proceeded with the appeal should be allowed: *Re Jones and Township of Tuckersmith* (1914), 6 O.W.N. 379.

The action came on for trial and the motion to be heard before Latchford, J., on the 30th September, 1914, and it is from the judgment which he directed to be entered that the appeal is brought.

My brother Latchford, differing from the conclusion reached by my brother Middleton, decided that, "although not opened up or accepted by the municipality," the part of Mill street which is in question became a public street, and he also held, following, as he said, *Roche v. Ryan*, 22 O.R. 107, that the freehold of it was vested in the appellant corporation. He also held that sec. 640, sub-sec. 11, of the Consolidated Municipal Act, under which, he said, it was argued that the respondents and other owners of lands on the west side of Mill street should have been given the option to purchase the street, and that only upon their refusal to purchase could the street be sold, did not "apply except in cases where a new road or street has been opened in lieu of the old;" citing in support of that conclusion *Cameron v. Wait*, 3 A.R. 176, 180.

Although he decided these questions in favour of the appellants, he came to the conclusion that the by-law must be quashed, because, as he held, "Mill street provided the only means of access to such lots as that owned, at the time the by-law was passed, by such persons as the" respondent "Jones," and because, as I understand his reasons for judgment, he was of opinion that the by-law was not passed in the public interest and perhaps also not in good faith.

The first question to be considered is, whether or not the part of Mill street which is in question was a common and public highway. It was laid out on a plan of a survey made for the owner of part of a farm lot in the township of Tuckersmith, and the plan was registered on the 13th August, 1873. On the plan are shewn 5 streets, one of which is Mill street, and 32 lots, 16 of which abut on Mill street. A survey had previously been

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made of a part of the farm lot lying southerly of the land included in this survey, belonging to another owner, and a plan of the earlier survey was registered on the 8th September, 1857, and upon it Mill street is laid down, and Mill street on the later plan is a continuation northerly of that street.

Prior to the 13th April, 1897, the provisions of what is now sec. 44 of the Surveys Act, R.S.O. 1914, ch. 166, did not apply to townships; but, by 60 Vict. ch. 27, sec. 20, they were made to extend to townships; and, by sec. 44 of 1 Geo. V. ch. 42, which was the Act in force when the by-law in question was passed, it is provided that, "subject to the provisions of the Registry Act, as to the amendment or alteration of plans, all allowances for roads, streets or commons surveyed in a city, town, village or township, or any part thereof, which have been or may be surveyed and laid out by companies or individuals and laid down on the plans thereof, and upon which lots fronting on or adjoining such allowances for roads, streets, or commons have been or may be hereafter sold to purchasers, shall be public highways, streets and commons" (sub-sec. 1).

This provision was first enacted by 12 Vict. ch. 35, sec. 41, and was then applicable only to towns and villages, but was extended to cities by 50 Vict. ch. 25, sec. 62, and afterwards to townships by the enactment to which I have referred.

By the Municipal Act of 1858 (22 Vict. ch. 99), sec. 323, from the roads, streets, bridges and highways which the corporation is required to keep in repair, are excepted "any road, street, bridge or highway laid out without the consent of the corporation by by-law until established and assumed by by-law;" and this provision, somewhat altered in form, has continued to form part of the Municipal Act down to the present time. In the Consolidated Municipal Act of 1903 it is found in sec. 607, which reads as follows: "The last preceding section" (i.e., the section imposing the obligation to repair) "shall not apply to any road, street, bridge or highway laid out by any private person, and the corporation shall not be liable to keep in repair any such last mentioned road, street, bridge or highway, until established by by-law of the corporation, or otherwise assumed for public

user by such corporation;" and the corresponding section in R.S.O. 1914, ch. 192, is sec. 460 (6).

This provision was also introduced as a proviso to sec. 62 (1) of ch. 152, R.S.O. 1887 (the Surveys Act), but was dropped from that Act in the consolidation of it by 1 Geo. V. ch. 42, in accordance with the practice adopted by the Commissioners for the last Revision of the Statutes of not duplicating the same provision.

I do not see any room for question as to the meaning and effect of sec. 44 of 1 Geo. V. ch. 42. The language used is plain—"shall be public highways, streets and commons"—and the provision exempting the municipal corporation from the obligation to keep them in repair until established or assumed was not intended to take away from them the character of public highways or streets unless and until they should be established or assumed, and has, in my opinion, no such effect.

There have always been provisions for altering or amending registered plans. At first, under 12 Vict. ch. 35, sec. 41, the owner of lands that had been laid out had the right to amend or alter the plan if no lots fronting on or adjoining any street or common where the alteration should be required to be made had been sold.

The corresponding provision of the present law is to be found in the Registry Act, R.S.O. 1914, ch. 124, sec. 86, which provides that a plan, though registered, is not to be binding upon the person registering it, or upon any other persons, unless a sale has been made according to it, and also provides for amendments or alterations to it being authorised or directed by a Judge; and it also provides (sub-sec. 4) that "no part of a road, street, lane or alley upon which any lot of land sold abuts, or which connects any such lot with or affords access therefrom to the nearest public highway, shall be altered or closed up without the consent of the owner of such lot; but nothing herein shall interfere with the powers of municipal corporations with reference to highways;" and a similar provision (10 Edw. VII. ch. 60, sec. 85(2)) was in force when the by-law in question was passed.

The effect of this legislation and of the provisions of the Municipal Act as to stopping up highways and selling them, was

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that there were two methods of stopping up highways laid down on a registered plan—one by the mode provided for by the Registry Act, at the instance of the person who registered the plan or of the owner for the time being of the land covered by it, and the other by the passing by the council having jurisdiction over the highway, under the powers conferred by sec. 637 (1) of the Consolidated Municipal Act, 1903, of a by-law stopping it up.

The effect of the action taken differs in the two cases. In the one case, no part of a road upon which any lot sold abuts, or which connects with or affords an access therefrom to the nearest public highway, can be closed up without the consent of the owner of the lot, and the consequence of closing it up where the road has not been established by by-law of the municipal corporation, or otherwise assumed by it for public use, is, that it belongs to the owners of the land included in the plan and abutting on the road; and in the other case the abutting owners have the option of purchasing the situs of the road at a price fixed by the council; and, if they do not exercise that option, it may be sold by the council to any other person, at that price or a higher one.

In my opinion, the Council of the Township of Tuckersmith had jurisdiction over Mill street—it being, by force of sec. 601 of the Consolidated Municipal Act, 1903, vested in the corporation of that township; and, under sec. 637 (1), the council had power to pass a by-law for stopping it up.

It was argued by counsel for the appellant that Mill street was not a public highway, and in support of that contention *Gooderham v. City of Toronto*, 25 S.C.R. 246, was relied upon. In that case some of the lots laid down on the registered plan had been sold, but, at the time when the provision of the Surveys Act now under consideration was made applicable to cities, the whole of that part of the tract that had been subdivided, as to which the question for decision had arisen, with the exception of one lot which was owned by a man named Smith and was held by one of the plaintiffs under a long lease from him, was owned by the plaintiffs, and the whole tract was enclosed as one parcel and used as a pasture-field. As I understand the reasoning of Gwynne, J., who delivered the judgment of the Court, the conclusion to which the Court came was based upon the view

that, inasmuch as, before what is now sec. 44 of the Surveys Act became applicable to cities, the plaintiffs had become entitled to all the lots that had been sold, and had therefore acquired the easements or private rights of the purchasers of the lots abutting on streets laid down on the registered plan, the position of matters was the same as if no lots had ever been sold; and, therefore, as by the section it was only where lots of land fronting on or adjoining them had been sold that the streets and commons were made public highways, streets, and commons, they never became public highways, streets, and commons.

That this was the *ratio decidendi* appears, I think, from the following passage of the report, pp. 261-2: "The language used in the section cannot reasonably be construed as affecting, or as intending to affect, any property so situated as to title as the property of the plaintiff under consideration is, nor, as regards the time past, anything else than roads or streets which at the time of the passing of the Act were then already in existence as private roads, to the use of which purchasers of property abutting thereon were then entitled, which roads and streets so in existence the section under consideration subject to the proviso as to the non-liability of the corporation to keep the same in repair converted into public highways."

In *Roche v. Ryan* it was decided by a Divisional Court that, under the Municipal Act and the Surveys Act, by the filing of a plan and the sale of lots according to it abutting on a street, the property in the street becomes vested in the municipal corporation, although it may have done no corporate act by which the corporation has become liable to keep it in repair.

That decision is not affected by the *Gooderham* case; and, so far as I am aware, the correctness of it has never been questioned. The survey which was in question was made in a town; and in *Sklitzsky v. Cranston*, 22 O.R. 590, which was the case of a survey of a township lot before sec. 62 of the Surveys Act then in force (ch. 152, R.S.O. 1887) was extended to townships, Street, J., after referring to the decision of the Divisional Court in *Roche v. Ryan*, pointed out that that case and sec. 62 had no application to a survey of a township lot, and said: "The plaintiff, however, having purchased his lots as lots laid down upon

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a registered plan shewing certain streets upon which they abutted, acquired as against the person who laid out the plot and sold him the land, a private right to use those streets, subject to the right of the public to make them highways" (p. 594).

In *In re Morton and City of St. Thomas* (1881), 6 A.R. 323, 329, Burton, J.A., said: "Apart from the Registry Act altogether, no one would think of disputing the proposition that if a person sells lots according to a particular map or plan, the purchasers acquire an interest in the streets or lanes shewn upon the plan adjoining the lots sold, which places them beyond vendor's future control to their injury. . . . The purchasers could unquestionably insist upon the lane" (i.e., the lane in question in that case) "being kept open for their use, but is it not clear that by agreement among themselves they could abstain from opening it altogether or enforce its being maintained as a private way?" And he then asks the question: "Does it not follow that the owner might, therefore, under such circumstances by a repurchase of all the lots sold, at all events before any actual use of the lane, re-invest himself with the same rights and dominion over the property which he had before the sale?"—a question that was answered in the affirmative by the Supreme Court of Canada in the *Gooderham* case, and a view with which, judging by what was said by Patterson, J.A. (p. 331), he did not agree. See also *Armour on Real Property*, p. 71.

In the case at bar, as I understand the evidence, all the lots fronting on Mill street were sold and are still owned by those who purchased them or by persons who derive title from the purchasers, and it is only the street that has been fenced in with the farm which Van Egmond, for whom the survey was made, and those claiming under him, have ever since occupied.

Unless, therefore, when the section was amended so as to include townships, the purchasers of these lots or their assigns had lost their rights or easements over Mill street, that street became a public highway upon the coming into force of the amendment.

It was argued by counsel for the appellants that the non-user of these rights or easements, and the occupation of the street as part of the farm of the adjoining land-owner ever since the plan was registered, have resulted in the loss of these rights or

easements; but I am not of that opinion. As Mr. Armour correctly states in his book on Real Property, p. 480: "It has been decided . . . that the Statute of Limitations does not apply to easements. Consequently, there is no bar under the statute for not bringing an action to prevent disturbance of the right. But an easement may be extinguished or abandoned. And it is a question of fact in each case whether there has been an abandonment of the right. Mere non-user is not of itself an abandonment, but is evidence with reference to an abandonment."

This statement is supported by the decided cases, and is in accordance with the statement of the law in Halsbury's Laws of England, vol. 11, pp. 278, 279, 280, para. 552.

In *Ward v. Ward* (1852), 7 Ex. 838, 839, 86 R.R. 852, 853, the right of way had not been used since 1814, and it was said by Alderson, B.: "The presumption of abandonment cannot be made from the mere fact of non-user. There must be other circumstances in the case to raise that presumption. . . . Here the owners of the Stubbing Pits did not use the way in question, for the simple reason that they had a more easy and convenient means of access to that part of their property." And Pollock, C.B., said: "It is a question of fact, and one which could only be found one way. The only inference that could reasonably be drawn from the non-user by this party is, that he had no occasion for it."

In *Crossley and Sons Limited v. Lightowler* (1867), L.R. 2 Ch. 478, 482, it was said by the Lord Chancellor (Chelmsford): "The authorities upon the subject of abandonment have decided that a mere suspension of the exercise of a right is not sufficient to prove an intention to abandon it. But a long continued suspension may render it necessary for the person claiming the right to shew that some indication was given during the period that he ceased to use the right of his intention to preserve it. The question of abandonment of a right is one of intention, to be decided upon the facts of each particular case."

In *James v. Stevenson*, [1893] A.C. 162, the question was as to a right of way which was granted in 1839. As in the case at bar, there was then no fence existing between the land conveyed and the land retained by the grantor. The action was brought

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in 1888. Up to that time there had been no user of the northern part of the way. The southern part had been used only on one occasion in 1872, and during all this time the defendant and his predecessors in title had used for farm purposes the land over which the roads would pass, and it was held by the Judicial Committee that these facts were insufficient to shew any intention to abandon the right of way. In stating the opinion of the Board, Sir Edward Fry said (p. 168): "It does not appear that occupants of the plaintiffs' land have ever had any occasion to use the northern part of the way, or the southern part, except once, and then they did so use it; and to have required gates to be inserted in the wooden fence at Banksia road and the road to Eltham, when the way was not wanted for use, would have been an unreasonable act, the omission of which cannot be construed as the expression of an intention to abandon the right of way. Nor is the occupation for agricultural purposes of the strips of land subject to the easement, when the easement was not wanted, in the opinion of their Lordships a conclusive circumstance. It is worthy of notice, in reference to this question of abandonment, that ever since the year 1875 the plaintiffs have distinctly asserted their right to the way which they now claim, and if in the earlier period there is no evidence of such assertion, it must not be forgotten that it is one thing not to assert an intention to use a way, and another thing to assert an intention to abandon it."

In a Massachusetts case, *Arnold v. Stevens* (1839), 24 Pick. 106, it was held by the Supreme Judicial Court of Massachusetts that in the case of a grant by deed of the right to dig ore in the land of another, which was treated as the grant of an easement, the mere neglect of the grantee, for forty years, to exercise the right, without any act of adverse enjoyment on the part of the owner of the land, did not extinguish the right; and that the occupation and cultivation of the land by the land-owner during that period was not evidence of adverse enjoyment, and that his occupation was consistent with the right of the owners of the easement. In this case the opinion was expressed that the presumption of abandonment and loss by disuse was applicable only to rights acquired by use, and did not therefore apply to

rights acquired by grant; but I have found no English or Canadian case in which such a distinction is made.

Applying, then, the principle of these cases to the facts of the case at bar, the proper conclusion is, I think, that the respondents had not lost their right to Mill street. Those of them or their predecessors in title who occupied their lots were also owners of lots on Centre street behind their Mill street lots; and, as Centre street was an open and travelled road, they had no occasion to use Mill street; and, besides this, the evidence leads me to the conclusion that Van Egmond and those who derived title to the farm from him always knew and recognised that there was no intention on the part of the owners of the lots fronting on Mill street to abandon their rights in respect of it.

These private rights or easements of course came to an end when Mill street became a public highway, and cannot therefore be relied upon as a bar to the right of the municipal council to close the street. See *Skłitzsky v. Cranston*, 22 O.R. at p. 595.

The conclusion having been come to that the part of Mill street which is in question had become a public highway, vested in the appellant corporation, it is undoubted that its council had power to close it: Consolidated Municipal Act, 1903, sec. 637(1).

There is nothing, I think, in the contention that the opponents of the by-law were not afforded an opportunity to state their objections to its being passed. They, or such of them as chose to go to the meeting at which the by-law was to be considered, were heard in opposition to it, and there was nothing to prevent the council, as it did at its first meeting in the following year, from coming to a conclusion as to whether or not the by-law should be passed, without giving the opponents of it an opportunity of again being heard. It is true that the respondent Robinson testified that he did not say all that he could have said, but he was not prevented from doing so, and, as he testified, only refrained from saying more because the solicitor for the corporation, who was present at the meeting, advised the council, or stated, that it had power to close any street. Robinson was not asked and did not state what it was that he would have said, and I am very doubtful of his ability to have added anything

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of importance to the arguments against the passing of the by-law which he and the other opponents of it had adduced.

Some observations reflecting on the conduct of Mr. Hays were made by my brother Latchford, because, as he thought, of the impropriety of Mr. Hays having acted as solicitor for the appellant Kruse as well as for the appellant corporation.

The only evidence that Hays had acted for Kruse was a statement by Kruse that Hays had prepared for him a petition in connection with the opening of the street. This statement was made by Kruse when called as a witness at the close of the case. He had not been called by either of the parties, but was called and examined by my learned brother of his own motion, and I doubt whether evidence so taken should be read. It was stated upon the argument that this statement of Kruse was not in accordance with the fact, and that Hays had not drawn the petition or acted for him in any way. However that may be, and assuming that he had drawn the petition, that circumstance, in my opinion, affords no ground for impeaching the by-law, especially as there was no evidence or even a suggestion that Hays said or did anything that was not strictly in the line of his duty as legal adviser to the council.

There is more difficulty as to the question whether, in the circumstances, the by-law is not open to the objection that it was not passed in the public interest, but was passed in the interest of the appellant Kruse, and ought therefore to be quashed; but I have come to the conclusion that there was nothing adduced in evidence to warrant the Court in quashing the by-law on that ground. There is nothing to suggest that the council or any member of it acted in bad faith, by which I mean acted under colour of an intention to serve the public interest, but in reality for the sole purpose of benefiting Kruse.

The part of Mill street which is in question was not required for the use of any one, unless it might be for the purpose of affording another means of access to the lots which front on it, and pressure was being brought on the council to open it. If opened, there would at once have been imposed upon the appellant corporation the duty of keeping it in repair, and liability for damages occasioned by failure to perform that duty. The council

evidently, and I think honestly, came to the conclusion that the street ought not to be opened and that the best way to put an end to the agitation for opening it was to close the street and sell it under the powers conferred upon the council by the Municipal Act. They were, no doubt, also influenced in coming to the conclusion to stop up and sell the street by the fact that the appellant Kruse was willing and anxious to become the purchaser of it, and that possession of it, or at all events of the part of it on which his lots abut, was, if not essential, important to enable him to carry on his tile business, which was thought to be an industry the carrying on of which would be of benefit to the town in a suburb in which the street is situate.

The questions raised on this branch of the case were under consideration in the recent case of *United Buildings Corporation v. Corporation of the City of Vancouver*, [1915] A.C. 345. In that case a by-law had been passed by the respondents closing up a lane, and the by-law was attacked upon grounds not unlike those upon which the by-law in question in this case is sought to be quashed. The by-law, after reciting that the Hudson's Bay Company owned certain lots and had petitioned the respondents to stop up a portion of a lane running between some of them, and had in return agreed to convey to the respondents other lots to be used for diverting the lane, and also to indemnify the respondents against claims or suits, enacted that that portion of the lane should be closed and stopped up, and that, upon a conveyance to the respondents of the lots last referred to, they would lease to the company the portion of the lane so closed and stopped up, upon the terms and conditions set out in a schedule to the by-law. The respondents had power to pass by-laws for stopping up lanes, and power, without the assent of the electors, to lease portions of lanes for a period not exceeding twenty-five years. The alteration to the lane was made at the instance and on the petition of the Hudson's Bay Company, and strong opposition was made to the petition by the appellants, who, as owners of property abutting on the unclosed portion of the lane, considered their premises to be injuriously affected. Evidence was given on the part of the respondents that the matter was decided unanimously by the Board of Works considering the

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request a reasonable one and thinking that in the interest of the city it ought to be granted, in view of the class of building which the Hudson's Bay Company proposed to erect and of the facilities offered in return to the other owners of the block in question; and each of three aldermen deposed that, in his opinion, the change improved the access of light to buildings on the lane and did not injuriously affect any of the owners of the other lots. There was no contradiction of this evidence, though there was evidence that the opposite opinion was entertained by other persons, and it had been held in the Court below, by a majority of the Judges, that the transaction was free from impropriety or bad faith. In stating the opinion of the Board, Lord Sumner said (p. 350): "It is easy, especially for those who conceive themselves to be sufferers by it, to suspect and to suggest and even to argue with some plausibility that such a transaction cannot have been carried through without some improper or sinister motive on the part of those members of the corporation who voted for it, in this case all who were voting: and, since opinions differed on this question in the Court below, their Lordships freely recognise that it might bear one aspect or the other, but judging it, as they must do, upon a judicial survey of the whole proved materials, with the experience of men of the world and the full persuasion that such a charge must be proved by those who make it, their Lordships are unable to differ from the opinion of those members of the Court below who held that the transaction was free from impropriety or bad faith." And the conclusion reached was that, though to those familiar with the *locus in quo* it might seem improbable, or even impossible, that the advantages to be derived from the change in the lane itself were the reason for enacting the by-law, as the plaintiffs had shaped and left their case, it was quite consistent with the possibility that the mere alteration of the lane itself was, partly and even largely, for the general benefit, and was an improvement in the interior communications of the city for the benefit of the public health in a wide sense of the term; and, that being the case, and no bad faith or improper conduct being shewn, their Lordships were unable to say that the decision of the Court below was wrong. In the Court of first instance, Clement,

J., was of opinion that the respondents had, under their Acts, the necessary powers, and found that the city council had considered the petition of the Hudson's Bay Company honestly and with regard for the public interest; and, under these circumstances, he held that the Court could not review the decision of the respondents.

In my opinion, what is or it not in the public interest, in a case such as this, is a matter to be determined by the judgment of the municipal council; and what it determines, if in reaching its conclusion the council act honestly and within the limits of its powers, is not, and in my humble judgment ought not to be, open to review by any Court. Whether the judgment of the Judicial Committee was intended to go as far as this, I do not know; but, however that may be, it affords satisfactory ground for holding, as I do, that the by-law in question is not open to attack upon the ground that it was not passed in the public interest or in good faith.

The third ground of attack is based on the prohibition contained in sub-sec. 1 of sec. 629 of the Consolidated Municipal Act, 1903, which provides that "no municipal council shall close up any public road or highway, whether an original allowance or a road opened by the Quarter Sessions or by any municipal council, or otherwise legally established, whereby any person will be excluded from ingress and egress to and from his lands or place of residence over such road, unless the council, in addition to compensation, also provides for the use of such person some other convenient road or way of access to the said lands or residence."

All the respondents except Jones, whose lot abuts on Mill street, and Dickson, who does not own any lot on that street, own the lots behind their Mill street lots, which abut on Centre street, and the two lots are occupied as one property, and they have never used Mill street as a means of access to the Mill street lots, but their access to their property is and has always been by way of Centre street, which, as I have said, is and has been for many years an open and travelled road. The effect of the by-law will not, I think, be to exclude these persons from ingress to and egress from their lands or places of residence

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within the meaning of sub-sec. 1 of sec. 629, as a similar provision was interpreted by the Court of Appeal in *In re McArthur and Township of Southwold* (1878), 3 A.R. 295, in which it was held that it applied only to cases where the only means or convenient means of access is over the road closed up, and not where there is already another means of access though a less convenient one.

Having regard to the fact that the Centre street lots and the Mill street lots are occupied as one property, and, as I have said, the only means of access to it which these respondents have ever used has been by way of Centre street, and the fact that, although some of the Mill street lots were sold as many as thirty years ago, no one has ever attempted to use Mill street as a means of access to his property, it must, I think, be held, following the *McArthur* case, that the effect of the by-law, so far as these persons are concerned, will not be to contravene the provisions of sub-sec. 1 of sec. 629.

The lot of the respondent Jones is lot 40, and its only means of access is by Mill street, but he acquired his lot from persons who owned the lot behind it, which fronts on Centre street, after the passing of the by-law. It was said that there had been a verbal arrangement for the sale of the lot to Jones before the by-law was passed; but, if there was, it was made after notice of the intention to pass the by-law was given, and the fact of its having been given had come to the knowledge of Jones; and I strongly suspect that his purchase was made for the purpose of making it impossible to pass the by-law, or to pass it without providing some other means of access to the lot. In these circumstances, the respondent Jones did not, I think, stand in any better position than the other respondents, and the case must be dealt with as if his lot, at the time of the passing of the by-law, had been still owned by the persons who sold to him.

The respondent Dickson, as I have said, does not own any land on Mill street, and he has other means of access to his property.

The by-law is, however, in my opinion, open to the objection that the council had no authority to sell the *situs* of the road without first offering it to the abutting owners at a price fixed

by the council, and that it is only in the event of the abutting owners declining to purchase that authority is given to sell to any one else, and then authority is given to sell at that price or a greater one. This is clearly the effect of sub-sec. 11 of sec. 640 of the Consolidated Municipal Act, 1903. My brother Latchford thought otherwise, but he evidently overlooked the fact that sub-sec. 11 includes "selling any road legally stopped up or altered by the council," and that the observations of Burton J.A., in *Cameron v. Wait*, 3 A.R. at p. 180, were not directed to the provisions of this section, but to sec. 426 of 36 Viet. ch. 48, which now forms sec. 641 of the Consolidated Municipal Act, 1903.

It is contended by counsel for the appellants, in a written memorandum put in since the argument, that the by-law was passed not under the authority of sub-sec. 11 of sec. 640, but of sub-sec. 1 of sec. 637, which makes no such provision as that contained in the other sub-section, as to selling to abutting owners; and it is pointed out, as the fact is, that the words "leasing" and "selling" were introduced into sub-sec. 1 of sec. 637 long after the provisions of sub-sec. 11 of sec. 640 were enacted. It is also contended that the provisions of this later sub-section are permissive, not obligatory.

These contentions are not, in my opinion, well-founded. What the object of introducing the word "selling" into sub-sec. 1 of sec. 637 was, it is difficult to discover; but, whatever it may have been, it is clear, I think, that sub-sec. 11 is applicable whether the by-law is based upon it or upon the other sub-section. It is also clear, I think, that, while the sections are permissive in the sense that it is optional with the council to sell or not to sell, the council, if it determines to sell, is bound to sell in the manner prescribed by sub-sec. 11. That it should be obligatory is manifestly only fair, and it is in accordance with the policy of the legislation as indicated in dealing with the other mode of closing up a highway, by an alteration of a registered plan under the provisions of the Registry Act.

It does not follow, however, that the whole by-law must be quashed. The sale of the street is provided for by sub-sec. 2, and its provisions are severable from the rest of the by-law.

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The result is that, in my opinion, sec. 2 of the by-law should be quashed, and the conveyance to the appellant Kruse should be set aside and the registration of it vacated; and the action and the motion, as far as sec. 1 of the by-law is concerned, should be dismissed.

As success is divided, there should be no costs throughout to either party.

Appeal allowed in part.

APPENDIX

Cases reported in the Ontario Law Reports and in the Ontario Weekly Notes decided on appeal to the Judicial Committee of the Privy Council and the Supreme Court of Canada and reported since the publication of volume 32 of the Ontario Law Reports:—

ARNPRIOR, TOWN OF, v. UNITED STATES FIDELITY AND GUARANTY Co., 30 O.L.R. 618, affirmed by the Supreme Court of Canada: TOWN OF ARNPRIOR v. UNITED STATES FIDELITY AND GUARANTY Co., 51 S.C.R. 94.

NORTHERN ELECTRIC AND MANUFACTURING Co. LIMITED v. CORDOVA MINES LIMITED, 31 O.L.R. 221, reversed by the Supreme Court of Canada: HUGHES v. NORTHERN ELECTRIC AND MANUFACTURING Co., 50 S.C.R. 626.

PASKWAN v. TORONTO POWER Co., 5 O.W.N. 823, affirmed by the Judicial Committee of the Privy Council: TORONTO POWER Co. LIMITED v. PASKWAN, [1915] A.C. 734.

ROBINSON v. GRAND TRUNK R.W. Co., 27 O.L.R. 290, reversed by the Supreme Court of Canada, 47 S.C.R. 622, and restored by the Judicial Committee of the Privy Council: GRAND TRUNK R.W. Co. OF CANADA v. ROBINSON, [1915] A.C. 740.

TORONTO, CITY OF, AND TORONTO AND SUBURBAN R.W. Co., RE, 29 O.L.R. 105, reversed by the Judicial Committee of the Privy Council: TORONTO SUBURBAN R.W. Co. v. TORONTO CORPORATION, [1915] A.C. 590.

WHITE v. NATIONAL PAPER Co., 6 O.W.N. 521, reversed by the Supreme Court of Canada: WHYTE v. NATIONAL PAPER Co., 51 S.C.R. 162.

WILLSON v. THOMSON, 31 O.L.R. 471, affirmed by the Supreme Court of Canada: THOMSON v. WILLSON, 51 S.C.R. 307.

WOOD v. GRAND VALLEY R.W. Co., 30 O.L.R. 44, affirmed by the Supreme Court of Canada: WOOD v. GRAND VALLEY R.W. Co., 51 S.C.R. 283.

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his motion for discharge from custody was refused, upon the ground that he had not obtained the consent of the Minister of Justice—sec. 11 of the War Measures Act, 1914, providing that no person who is under arrest or detention as an alien enemy, or upon suspicion that he is an alien enemy, shall be released upon bail, or otherwise discharged or tried, without the consent of the Minister of Justice.—It is the duty of the Court to give full effect to that enactment: to attempt to whittle it down, or to evade its provisions in any respect, would be inexcusable, even in a hard case. *Re Beranek*, 139.

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APPEAL.

1. *To Divisional Court of Appellate Division from Order of Judge of County Court—Final Order—County Courts Act, R.S. O. 1914, ch. 59, sec. 40 (2).]*—Upon a motion by the defend-

ants L. and C. to strike out the statement of claim and dismiss the action against them, the Junior Judge of the County Court made an order (*in invitum* the applicants) allowing the plaintiffs to vacate their default judgment against T. and to amend the writ of summons and statement of claim as they might be advised:—*Held*, that this order was “final in its nature,” not “merely interlocutory,” within the meaning of sec. 40 (2) of the County Courts Act, R.S.O. 1914, ch. 59, and that an appeal lay therefrom. — *Smith v. Traders Bank* (1905), 11 O.L.R. 24, applied and followed. *M. Brennen & Sons Manufacturing Co. Limited v. Thompson*, 465.

2. *To Divisional Court of Appellate Division from Order of Judge of District Court*—*Time*—*County Courts Act, R.S.O. 1914, ch. 59, sec. 44*—*Extension*—*Indulgence*.]—An order for summary judgment under Rule 57 was made by the Judge of a District Court, in an action therein, on the 10th October; the defendant's appeal therefrom was set down on the 29th November, upon the fiat of a Judge, on the undertaking of the defendant to file all papers within one week from that date, etc. The papers not having been completed within the week, it was *held*, that the appeal was not set down within the time prescribed by sec. 44 of the County Courts Act, R.S.O. 1914, ch. 59; and the case was not one in which the indulgence of an extension should be granted. *Carter v. Hicks*, 149.

See COSTS, 1, 2, 3—DIVISION COURTS — EVIDENCE — FRAUDULENT CONVEYANCE — HIGHWAY, 2—MASTER AND SERVANT, 1—MUNICIPAL ELECTIONS, 2— NEGLIGENCE.

APPEARANCE.

See JUDGMENT, 3.

APPOINTMENT.

See EVIDENCE.

ARBITRATION AND AWARD.

See DITCHES AND WATER-COURSES ACT.

ARCHITECT.

See CONTRACT, 1.

ARREST.

See ALIEN ENEMY.

ASSESSMENT AND TAXES.

See CONSTITUTIONAL LAW—LIMITATION OF ACTIONS — MUNICIPAL ELECTIONS, 1.

ASSIGNMENTS AND PREFERENCES.

1. *Assignment for Benefit of Creditors under Assignments and Preferences Act*—*Summary Application by Assignee for Determination of Conflicting Claims to Rank on Estate*—*Jurisdiction*—*Trustee Act, sec. 66*—*Rule 600*—*Contest between Creditor and Surety*.]—An assignee for the benefit of creditors, under an assignment which comes within the provisions of the Assignments and Preferences Act, R.S.O. 1914,

ch. 134, is not entitled, upon a summary application to the Court, under sec. 66 of the Trustee Act, R.S.O. 1914, ch. 121, or under Rule 600, to have conflicting claims of right to rank upon the estate determined.—When special provisions are enacted for dealing with particular cases, these provisions are to govern, even though there may be some general provisions of another enactment wide enough to cover some of them; and the Assignments and Preferences Act contains special provisions applicable for the determination of all questions respecting distribution of an assigned estate.—The contest being between creditor and surety as to the right to rank upon the debtor's estate—*semble*, that, if the surety were surety for the whole debt, he could not rank in competition with the creditors until the whole debt was paid; but, if the surety was answerable for part of the debt only—under no obligation as to any other part—on payment of that part, he, and not the creditor, would be entitled to rank in respect of it. *Re Fearnley's Assignment*, 492.

2. *Title to Land—Conveyance to Trustee for Benefit of Certain Creditors—Mortgage — Registration — Notice — Priorities — Estoppel—Rights of Assignee.*—An assignee for the benefit of creditors takes no greater title to land included in the assignment than the assignor can give. Under the Assignments and Preferences Act, an assignee has certain rights as to attacking convey-

ances, etc., which his assignor has not; but these rights are purely statutory, and, apart from them, he stands in the same position as his assignor. The same rule applies where the assignment is not a general one, but is made for the purpose of securing certain creditors only.—*Thibaudeau v. Paul* (1895), 26 O.R. 385, and *Steele v. Murphy* (1841), 3 Moore P.C. 445, followed.—And it was *held*, in this case, applying these rules, that a mortgage made by direction of L., the equitable owner of land, in favour of S., had priority over a subsequent conveyance of the land to a trust company in trust for certain creditors of L., though the latter was first registered, and the trust company had no notice of the mortgage—L. being estopped from denying the validity of the mortgage, and the trust company, although it had the prior registered title, taking from L. no greater title than he in truth and in good conscience possessed. *Re Wilson Estate*, 500.

See COMPANY, 4.

BANKS AND BANKING.

See BILLS AND NOTES, 1—
CRIMINAL LAW.

BENEVOLENT SOCIETY.

See INSURANCE, 2.

BILL OF EXCHANGE.

See BILLS AND NOTES, 1.

BILL OF LADING.

See PRINCIPAL AND AGENT, 1.

BILLS AND NOTES.

1. *Bill of Exchange—Acceptance for Accommodation and upon Condition—Delivery to Bankers of Drawer—Knowledge of Bankers—Oral Evidence—Admissibility—Holder in Due Course.*—A bill of exchange, drawn by a manufacturing company upon and accepted by the defendants, was delivered by the company to its bankers, the plaintiffs, and placed to its credit upon an overdrawn account. In an action to recover the amount of the bill, it was *held*, upon the evidence, that the defendants accepted the bill for the accommodation of the company and upon the distinct understanding and agreement, to which the plaintiffs were parties, that the defendants would not be called upon to pay it unless they were, at its maturity, indebted to the company; that oral evidence to establish the condition or agreement upon which the bill was accepted was admissible, not to vary the written document, but to shew that the operation of it was suspended until an indebtedness at the end of the term mentioned in it should be ascertained; and the plaintiffs were not holders in due course.—Consideration of the provisions of the Bills of Exchange Act, secs. 38, 39, 54, 55, 56, 74, and review of the authorities. *Standard Bank of Canada v. Wettlaufer*, 441.

2. *Promissory Note—Addition of Words—Executory Consideration—Negotiable Instrument.*—In

an instrument in the form of a promissory note, made by the defendants, payable to the order of S. Bros., and by the latter endorsed to the plaintiffs, the lithographed words "value received" were struck out, and above was written "account of lumber to be shipped:."—*Held*, that the instrument was a promissory note: that the words introduced were merely a statement of the transaction giving rise to the note, and did not qualify the actual promise to pay therein set forth; and that the plaintiffs, being holders in due course, were entitled to recover in an action for the amount of the note. *MERCHANTS BANK OF CANADA v. BURY*, 204.

See INSURANCE, 3.

BOARD OF RAILWAY COMMISSIONERS.

See MUNICIPAL CORPORATIONS, 6—RAILWAY, 2.

BRITISH NORTH AMERICA ACT.

See CONSTITUTIONAL LAW.

BUILDING CONTRACT.

See CONTRACT, 1—MECHANICS' LIENS.

BUILDING SCHEME.

See DEED.

BUILDINGS.

See FACTORY SHOP AND OFFICE BUILDING ACT — MUNICIPAL CORPORATIONS, 4—VENDOR AND PURCHASER.

BY-LAWS.

See HIGHWAY — MUNICIPAL CORPORATIONS.

CALLS.

See COMPANY, 3.

CANADA TEMPERANCE ACT.

Voting on Petition for Bringing Part II. into Force in County—Jurisdiction of Supreme Court of Ontario to Declare Proceedings Void—Tribunal Provided by Act, R.S.C. 1906, ch. 152, sec. 69—Scrutiny by County Court Judge—Scope of—Governor in Council—Powers of—Sec. 105—Action—Constitution of—Parties—Returning Officer—Injunction.] — The Canada Temperance Act (R.S.C. 1906, ch. 152) provides its own Code of procedure; and the provision which it makes for an inquiry as to whether or not a majority of the votes was or was not given in favour of the petition to the Governor in Council to bring Part II. of the Act into force in a county, affords the only way in which, by a judicial proceeding, the result of the voting can be inquired into.—Discussion as to the scope of a scrutiny under sec. 69 of the Act. *Chapman v. Rand* (1885), 11 S.C.R. 312, considered.—*Semble, per MEREDITH, C.J.O.*, that the “tribunal having cognizance of the question” referred to in sec. 105 is the tribunal before which the scrutiny authorised by sec. 69 takes place—that is, in Ontario, the Judge of the County Court. — *Semble, per HODGINS, J.A.*, that, having regard to the various provisions of

the Act contained in secs. 11 (j), 15, 18, 19, 39, 54, 59, 60, 61, 62, 63, 64, 102, 105, 106, 108, and 110, the tribunal referred to in sec. 105 is the Governor in Council; and also that, if jurisdiction could be assumed, the action was not properly constituted. *Murdock v. Kilgour*, 412.

CARRIERS.

See PRINCIPAL AND AGENT, 1.

CASES.

Ackersviller v. County of Perth (1914), 32 O.L.R. 423, affirmed.] — See HIGHWAY, 2.

Allen v. Furness (1892), 20 A.R. 34, followed.] — See WILL, 2.

Ash (Claudius) Sons & Co. Ltd. v. Invicta Manufacturing Co. Limited (1912), 29 R.P.C. 465, followed.] — See TRADE MARK.

Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co. Limited (1913), 17 Commonwealth L.R. 644, [1914] A.C. 237, followed.] — See MUNICIPAL CORPORATIONS, 5.

Banco de Portugal v. Waddell (1880), 5 App. Cas. 161, referred to.] — See COMPANY, 5.

Bank of Toronto v. Lambe (1887), 12 App. Cas. 575, explained and applied.] — See CONSTITUTIONAL LAW.

Bartram v. Supreme Council of the Royal Arcanum (1905), 6 O.W.R. 404, followed.] — See INSURANCE, 2.

Bell v. Grand Trunk R.W. Co. (1913), 48 S.C.R. 561, distinguished.] — See RAILWAY, 1.

Besterman v. British Motor Cab Co., [1914] 3 K.B. 181, followed.]—See COSTS, 2.

Biggar v. Rock Life Assurance Co., [1902] 1 K.B. 516, considered.]—See INSURANCE, 1.

Booth, In re, [1894] 2 Ch. 282, considered.]—See WILL, 2.

Breithaupt v. Marr (1893), 20 A.R. 689, followed.]—See MORTGAGE, 2.

British Columbia Electric R.W. Co. Limited v. Stewart, [1913] A.C. 816, 14 D.L.R. 8, explained and distinguished.] — See CONTRACT, 2.

Cameron v. Bradbury (1862), 9 Gr. 67, followed.]—See EXECUTION, 1.

Cameron v. Wait (1878), 3 A.R. 175, 180, distinguished.]—See HIGHWAY, 1.

Carnahan, Re (1912), 4 O.W.N. 115, considered.]—See INFANTS, 2.

Carvill, The Fanny M. (1875), 13 App. Cas. 455 (note), distinguished.]—See STATUTES.

Caspar v. Keachie (1877), 41 U.C.R. 599, distinguished.]—See EXECUTION, 2.

Chandler v. Gibson (1901), 2 O.L.R. 242, considered.] — See WILL, 1.

Chapman v. Rand (1885), -11 S.C.R. 312, considered.]—See CANADA TEMPERANCE ACT.

Choate v. Ontario Rolling Mill Co. Limited (1900), 27 A.R. 155, applied.]—See MINES AND MINERALS.

Cillis v. Oakley (1914), 31 O.L.R. 603, considered.] — See MOTOR VEHICLES ACT.

Clements v. Ohrly (1847), 2 C. & K. 686, considered.]—See MALICIOUS PROSECUTION.

Clinton Thresher Co., Re (1910), 15 O.W.R. 318, 1 O.W.N. 445, applied.]—See COMPANY, 4.

Connors v. Reid (1911), 25 O.L.R. 44, followed.]—See MALICIOUS PROSECUTION.

Cook v. Noble (1886), 12 O.R. 81, approved.]—See WILL, 2.

Cooper v. Cooper (1874), L.R. 7 H.L. 53, followed.]—See EXECUTORS AND ADMINISTRATORS.

Crown Tailoring Co. v. City of Toronto (1903), 33 O.L.R. 92 (note), not followed.] — See MUNICIPAL CORPORATIONS, 2.

Day v. Day (1871), L.R. 3 P.C. 751, applied and followed.]—See LIMITATION OF ACTIONS.

Devitt v. Mutual Life Insurance Co. of Canada (1914), 33 O.L.R. 68, reversed.]—See INSURANCE, 3.

Doe dem. Hall v. Mouldsdale (1847), 16 M. & W. 689, followed.]—See WILL, 1.

Drope, Re (1902), 5 O.L.R. 99, followed.]—See LUNATIC.

Elliman Sons & Co. v. Carrington & Son Limited, [1901] 2 Ch. 275, not followed.]—See CONTRACT, 4.

Evershed v. Evershed (1882), 46 L.T.R. 690, referred to.]—See INFANTS, 1.

Finch v. Gilray (1889), 16 A.R. 484, distinguished.]—See LIMITATION OF ACTIONS.

Fuches v. Hamilton Tribune Co. (1884), 10 P.R. 409, distinguished.]—See COMPANY, 4.

Garland v. Clarkson (1905), 9 O.L.R. 281, distinguished.]—See DISCOVERY.

Ghee v. Northern Union Gas Co. (1899), 158 N.Y. 510, 513, approved and applied.] — See CONTRACT, 2.

Gibbons v. Cozens (1898), 29 O.R. 356, followed.]—See EXECUTION, 1.

Godson v. City of Toronto (1890), 18 S.C.R. 36, followed.]—See MUNICIPAL CORPORATIONS, 5.

Gooderham v. City of Toronto (1895), 25 S.C.R. 246, explained and distinguished.]—See HIGHWAY, 1.

Graham v. Commissioners for Queen Victoria Niagara Falls Park (1896), 28 O.R. 1, distinguished.]—See PROVINCIAL BOARD OF HEALTH.

Grainger v. Order of Canadian Home Circles (1914), 31 O.L.R. 461, affirmed.]—See INSURANCE, 2.

Grand Trunk R.W. Co. v. Griffith (1911), 45 S.C.R. 380, applied.]—See MINES AND MINERALS.

Grand Trunk R.W. Co. v. McKay (1903), 34 S.C.R. 81, distinguished.]—See RAILWAY, 1.

Grant v. Acadia Coal Co. (1902), 32 S.C.R. 427, applied.]—See MINES AND MINERALS.

Grant v. Fuller (1902), 33 S.C.R. 34, considered.]—See WILL, 1.

Harris v. Mudie (1882), 7 A.R. 414, 421, referred to.]—See WILL, 1.

Hastings Mutual Fire Insurance Co. v. Shannon (1878), 2 S.C.R. 394, considered.]—See INSURANCE, 1.

Healy v. Ross (1914), 32 O.L.R. 184, reversed.]—See DITCHES AND WATERCOURSES ACT.

Hill v. Ashbridge (1892), 20 A.R. 44, distinguished.]—See WILL, 1.

Hobbs, In re (1887), 36 Ch.D. 553, followed.]—See WILL, 1.

Holness v. Mackay & Davis, [1899] 2 Q.B. 319, applied.]—See MASTER AND SERVANT, 2.

Johnson v. Parr (1873), Russell Eq. Dec. (N.S.) 98, followed.]—See TRADE MARK.

Jones v. Canadian Pacific R.W. Co. (1913), 30 O.L.R. 331, applied.]—See MINES AND MINERALS.

Keeler's Mortgage, In re (1863), 32 L.J.Ch. 101, not followed.]—See MORTGAGE, 1.

Kelly v. Barton (1895), 26 O.R. 608, 22 A.R. 522, followed.]—See MUNICIPAL CORPORATIONS, 5.

Kelly v. City of Winnipeg (1898), 12 Man. R. 87, explained and approved.]—See MUNICIPAL CORPORATIONS, 2.

Kingsland, In re (1879), 7 P.R. 460, followed.]—See MORTGAGE, 1.

Klæbe, In re (1884), 28 Ch.D. 175, 177, referred to.]—See COMPANY, 5.

Lake Erie and Detroit River R.W. Co. v. Sales (1896), 26 S.C.R. 663, 677, referred to.]—See PLEADING.

Lambert v. Rowe, [1914] 1 K.B. 38, applied.]—See LIQUOR LICENSE ACT.

Lane v. City of Toronto (1904), 7 O.L.R. 423, distinguished.]—See MUNICIPAL CORPORATIONS, 5.

Lavery v. Pursell (1888), 39 Ch.D. 508, followed.]—See EXECUTION, 1.

Lazier v. Henderson (1898), 29 O.R. 673, 679, followed.]—See COMPANY, 4.

Lea (R. J.) Limited's Application, In re, [1913] 1 Ch. 446, applied.]—See TRADE MARK.

Lee v. Friedman (1909), 20 O.L.R. 49, considered.]—See COMPANY, 6.

London and County Banking Co. v. Goddard, [1897] 1 Ch. 642, 650, followed.]—See MORTGAGE, 1.

London and Lancashire Life Assurance Co. v. Fleming, [1897] A.C. 499, explained and distinguished.]—See PRINCIPAL AND AGENT, 2.

Lorne Park, Re (1913), 30 O.L.R. 289, affirmed.]—See DEED.

Lovegrove v. London Brighton and South Coast R.W. Co. (1864), 16 C.B.N.S. 669, 692, applied.]—See NEGLIGENCE.

Lowry v. Thompson (1913), 29 O.L.R. 478, considered.]—See MOTOR VEHICLES ACT.

McArthur and Township of Southwold, In re (1878), 3 A.R. 295, followed.]—See HIGHWAY, 1.

McDonald v. Grundy (1904), 8 O.L.R. 113, distinguished.]—See EXECUTION, 2.

Macdonald v. Norwich Union Insurance Co. (1884), 10 P.R. 462, distinguished.]—See DISCOVERY.

McGeachie v. North American Life Assurance Co. (1894), 23 S.C.R. 148, followed.]—See INSURANCE, 3.

McLeod v. Power, [1898] 2 Ch. 295, referred to.]—See PRINCIPAL AND AGENT, 3.

McMullen v. Wetlaufer (1914), 32 O.L.R. 178, affirmed.]—See MALICIOUS PROSECUTION.

McNiven v. Pigott (1914), 31

O.L.R. 365, explained.]—See VENDOR AND PURCHASER.

McNiven v. Pigott (1914), 33 O.L.R. 78, affirmed on one branch and reversed on the other.]—See VENDOR AND PURCHASER.

McPherson v. Temiskaming Lumber Co., [1913] A.C. 145, referred to.]—See EXECUTION, 1.

Marshall, In re, [1914] 1 Ch. 192, specially referred to.]—See EXECUTORS AND ADMINISTRATORS.

Metal Constituents Limited, In re, [1902] 1 Ch. 707, followed.]—See COMPANY, 3.

Miller, In re (1909), 19 O.L.R. 381, overruled.]—See WILL, 2.

Morel Brothers & Co. Limited v. Earl of Westmorland, [1903] 1 K.B. 64, [1904] A.C. 11, 14, referred to.]—See PRINCIPAL AND AGENT, 3.

Neil v. Almond (1897), 29 O.R. 63, distinguished.]—See EXECUTION, 2.

Noble v. Noble (1912), 27 O.L.R. 342, distinguished.]—See LIMITATION OF ACTIONS.

Norris, Re (1902), 5 O.L.R. 99, followed.]—See LUNATIC.

North-West Transportation Co. v. Beatty (1887), 12 App. Cas. 589, specially referred to.]—See COMPANY, 2.

Olson v. Machin (1912), 4 O.W.N. 287, 23 O.W.R. 531, considered.]—See COMPANY, 6.

Ontario Insurance Act and Supreme Legion Select Knights of Canada (1899), 31 O.R. 154, distinguished.]—See INSURANCE, 2.

Packham v. Gregory (1845), 4 Hare 396, followed.]—See WILL, 3.

Paddington Corporation v. Attorney-General, [1906] A.C. 1, specially referred to.]—See MUNICIPAL CORPORATIONS, 4.

Partington v. Hawthorne (1888), 52 J.P. 807, explained.]—See PRINCIPAL AND AGENT, 3.

Payton & Co. v. Snelling Lampard & Co., [1901] A.C. 308, followed.]—See TRADE MARK.

Pembroke, Township of, v. Canada Central R.W. Co. (1882), 3 O.R. 503, distinguished.]—See CONTRACT, 2.

Pigott v. Bell (1913), 5 O.W.N. 314, referred to.]—See VENDOR AND PURCHASER.

Price v. Wade (1891), 14 P.R. 351, distinguished.]—See EXECUTION, 2.

Provident Chemical Works v. Canada Chemical Manufacturing Co. (1902), 4 O.L.R. 545, followed.]—See TRADE MARK.

Randall v. Ahearn & Soper Limited (1904), 34 S.C.R. 698, applied.]—See MASTER AND SERVANT, 1.

Regina v. Boyd (1896), 4 Can. Crim. Cas. 219, considered.]—See CRIMINAL LAW.

Regina v. Bryant (1899), 63 J.P. 376, considered.]—See CRIMINAL LAW.

Regina v. Jones (1898), 19 Cox C.C. 87, considered.]—See CRIMINAL LAW.

Regina v. Justices of Lancashire (1857), 8 E. & B. 563, applied.]—See CONTRACT, 2.

Registrar of Trade Marks v. W. & G. Du Cros Limited, [1913] A.C. 624, applied.]—See TRADE MARK.

Renals v. Cowlshaw (1878-9), 9 Ch.D. 125, 11 Ch.D. 866, specially referred to.]—See DEED.

Rex v. Board of Education, [1910] 2 K.B. 165, followed.]—See PROVINCIAL BOARD OF HEALTH.

Rex v. Campbell (1912), 5 D.L.R. 370, 19 Can. Crim. Cas. 407, considered.]—See CRIMINAL LAW.

Rex v. Lords Commissioners of His Majesty's Treasury, [1909] 2 K.B. 183, followed.]—See PROVINCIAL BOARD OF HEALTH.

Rice v. Frayser (1885), 24 Fed. Repr. 460, referred to.]—See INFANTS, 1.

Roach v. McLachlan (1892), 19 A.R. 496, followed.]—See MORTGAGE, 2.

Robinson v. Morris (1908), 15 O.L.R. 649, followed.]—See JUDGMENT, 3.

Roche v. Ryan (1892), 22 O.R. 107, approved.]—See HIGHWAY, 1.

Rutter & Co. v. Smith (1900), 18 R.P.C. 49, followed.]—See TRADE MARK.

Sharon and Stuart, Re (1906), 12 O.L.R. 605, referred to.]—See WILL, 1.

Sladden v. Smith (1858), 7 U.C.C.P. 74, overruled.]—See WILL, 1.

Smallwood Brothers v. Powell (1910), 1 O.W.N. 1025, followed.]—See CONTRACT, 1.

Smith v. Traders Bank (1905), 11 O.L.R. 24, applied and followed.]—See APPEAL, 1.

Spicer v. Martin (1888), 14 App. Cas. 12, specially referred to.]—See DEED.

Spilling v. O'Kelly (1904), 8 Can. Ex. C.R. 426, followed.]—See TRADE MARK.

Steele v. Murphy (1841), 3

Moore P.C. 445, followed.]—See ASSIGNMENTS AND PREFERENCES, 2.

Stinson and College of Physicians and Surgeons of Ontario (1912), 27 O.L.R. 565, followed.]—See COSTS, 1.

Stow v. Currie (1909), 14 O.W.R. 223, 224, followed.]—See DISCOVERY.

Sudeley v. Attorney-General, [1897] A.C. 11, followed.]—See EXECUTORS AND ADMINISTRATORS.

Tenby Corporation v. Mason, [1908] 1 Ch. 457, applied and followed.]—See MUNICIPAL CORPORATIONS, 3.

Tew v. Toronto Savings and Loan Co. (1898), 30 O.R. 76, followed.]—See COMPANY, 4.

Thibaudeau v. Paul (1895), 26 O.R. 385, followed.]—See ASSIGNMENTS AND PREFERENCES, 2.

Toronto Electric Light Co. v. City of Toronto (1914), 31 O.L.R. 387, reversed.]—See CONTRACT, 2.

Trethewey v. Trethewey (1907), 10 O.W.R. 893, approved and followed.]—See EVIDENCE.

Underwood, In re (1857), 3 K. & J. 745, distinguished.]—See MORTGAGE, 1.

United Buildings Corporation v. Corporation of the City of Vancouver, [1915] A.C. 345, applied.]—See HIGHWAY, 1.

Walters v. Staveley Coal and Iron Co. Limited (1910-11), 4 B.W.C.C. 89, 303, applied.]—See MASTER AND SERVANT, 2.

Wampole & Co. v. F. E. Karn Co. Limited (1906), 11 O.L.R. 619, followed.]—See CONTRACT, 4.

Whitby v. Mitchell (1888-9), 42 Ch.D. 494, 44 Ch.D. 85, considered.]—See WILL, 1.

Williams v. Mayor, etc., of Manchester (1897), 13 Times L.R. 299, distinguished.]—See MUNICIPAL CORPORATIONS, 3.

Winterbottom v. London Police Commissioners (1901), 1 O.L.R. 549, 2 O.L.R. 105, followed.]—See MUNICIPAL CORPORATIONS, 5.

Wolsely Tool and Motor Car Co. v. Jackson Potts & Co. (1915), 33 O.L.R. 96, affirmed.]—See PRINCIPAL AND AGENT, 1.

Woodall, In re (1904), 8 O.L.R. 288, distinguished.]—See EXECUTION, 2.

Wyatt v. Great Western R.W. Co. (1865), 34 L.J.Q.B. 204, distinguished.]—See RAILWAY, 2.

Wynne v. Dalby (1913), 30 O.L.R. 67, considered.]—See MOTOR VEHICLES ACT.

CASH SURRENDER VALUE.

See INSURANCE, 3.

CEMETERY COMPANY.

See COMPANY, 1.

CLASS ACTION.

See COMPANY, 1.

CLOSING STREET.

See HIGHWAY, 1.

COLLUSION.

See CONTRACT, 1—SOLICITOR.

COMMITTEE.

See LUNATIC.

COMMONS.

See DEED.

COMPANY.

1. *Cemetery Company—Power to Sell Lands not Required for Cemetery Purposes—Act respecting Cemetery Companies, R.S.O. 1887, ch. 175—Effect of Registration under secs. 2 (b), 3—Status of Plaintiff in Action to Set aside Conveyance—Shareholder—Class Action—Estoppel—Re-incorporation of Company, under Companies Act, 2 Geo. V. ch. 31—Effect of sec. 13—Powers of Provincial Secretary—Trusts.*—Previous to 1893, a number of persons, including the plaintiff S., formed themselves into a company under the provisions of the Act respecting Cemetery Companies, R.S.O. 1887, ch. 175; they acquired 50 acres of land, and signed a certificate, in the form prescribed by sec. 3 of the Act, and registered it on the 14th April, 1893. The directors of the company, in 1912, applied to the Provincial Secretary, under sec. 11 of the Companies Act, 2 Geo. V. ch. 31, for re-incorporation; and letters patent re-incorporating the company were issued on the 18th October, 1912, which purported to give the re-incorporated company power to sell, alienate, and convey any of the lands held by the old company, and any other lands not required for the purposes of the company, if deemed necessary or expedient. The directors of the old company then transferred all its assets to the new company, and the new company sold and conveyed a part of the 50 acres to the defendant W.:—*Held*, that the plaintiffs could maintain the action: the plaintiff S. was

a shareholder, and entitled to sue on behalf of his class; the proceedings should be amended so as to shew that he so sued; the plaintiff S. was not, by reason of his participation in the movement for re-incorporation, estopped from attacking the conveyance to W.—(2) That, when the certificate mentioned in secs. 2 (b) and 3 of R.S.O. 1887, ch. 175, was registered, the company became a body corporate, and its land became subject to trusts inconsistent with a power to sell except for burial purposes: secs. 2, 12, 17, 32, 33.—(3) That it was the duty of the old company to hold the land upon the trusts declared by the statute; and this duty attached to the new company, and might be enforced against it as though it had itself been subject to it *ab origine*: sec. 13 of the Companies Act, 2 Geo. V. ch. 31. The powers of the Provincial Secretary were strictly limited by the statute; and could not be considered to extend to granting authority to trustees to sell lands which they had in trust and to put the proceeds in their own or the shareholders' pockets. *Smith v. Humbervale Cemetery Co.*, 452.

2. *Contracting Company—Contract Taken by Majority of Directors as Individuals—Disclosure—Ratification by Shareholders—Duties and Liabilities of Directors—Trust—Rights of Minority of Shareholders in Absence of Fraud—Ontario Companies Act, R.S.O. 1914, ch. 178, secs. 23, 93—7 Edw. VII. ch. 34, secs. 80, 81, 87, 89—Interpretation Act, R.S.O.*

1914, ch. 1, sec. 27—*Closing of Business of Company—Use of Organisation of Company in Carrying out Contract—Right of Action.*—The plaintiff, owning one quarter of the shares in an incorporated contracting company, sued the three defendants, the owners of the remaining shares—the four being the directors—for an account of the profits of a contract taken by the defendants for themselves, not for the company:—*Held*, that to give the plaintiff the relief sought would be so to extend the fiduciary duty of a director that minority control would be the rule, instead of an exception caused by the fraud or unfair dealing of the majority.—The Ontario Companies Act, R.S.O. 1914, ch. 178, secs. 23, 93, 7 Edw. VII. ch. 34, secs. 80, 81, 87, 89, and the Interpretation Act, R.S.O. 1914, ch. 1, sec. 27, considered.—*North-West Transportation Co. v. Beatty* (1887), 12 App. Cas. 589, specially referred to.—*Held*, also, that the virtual winding-up of the company or the determination to cease business did not give the minority shareholder a right of action in the name of the company against the directors; nor did the absorption by the three defendants of the personnel of the organisation of the company in the course of carrying out the contract—it not being contended that these defendants induced the employees to break their engagements with the company. *Cook v. Deeks*, 209.

3. Original Subscriber for Shares

and Petitioner for Incorporation—Liability for Calls—Subscription Procured by Fraud of Promoter.]—

If shares in a company be subscribed for on the faith of a prospectus, the shares issued on such a subscription, if it is fraudulent and the fraud induces the subscription, are not to be forced upon the subscriber, for the prospectus is the basis of the contract for shares, and the company by issuing stock thereon ratifies and adopts the prospectus, even where it is issued before incorporation. But where a person petitions for a charter and becomes an original shareholder named as such in the charter, the same rule does not apply; any misrepresentation made is the act of a promoter, not the company; the company, not being in existence, cannot make any misrepresentation, and there is no ratification by the company.—*In re Metal Constituents Limited*, [1902] 1 Ch. 707, followed. *Buff Pressed Brick Co. v. Ford*, 264.

4. *Winding-up — Landlord's Preferential Lien for Rent—Landlord and Tenant Act, R.S.O. 1914, ch. 155, sec. 38—Voluntary Assignment for General Benefit of Creditors before Winding-up Order—Assets Taken by Liquidator Subject to Preferential Lien—Winding-up Act, R.S.C. 1906, ch. 144, secs. 5, 23, 133.*—The words “the preferential lien of the landlord for rent,” in sec. 38 of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, in regard to the case of an assignment for the general benefit of creditors by a tenant, mean that the landlord

has a statutory lien upon goods available for distress, independent of actual distress or possession, for the amount of the rent as limited by the section.—*Lazier v. Henderson* (1898), 29 O.R. 673, 679, and *Tew v. Toronto Savings and Loan Co.* (1898), 30 O.R. 76, followed.—Where an incorporated company made an assignment for the general benefit of creditors, its assets in the hands of the assignee became subject to the preferential lien of its landlord for rent; and a winding-up order under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, being subsequently made, these assets became vested in the liquidator, subject to the preferential lien of the landlord for the limited amount of rent.—Sections 5, 23 and 133 of the Winding-up Act considered.—*Re Clinton Thresher Co.* (1910), 15 O.W.R. 318, 1 O.W.N. 445, applied. — *Fuches v. Hamilton Tribune Co.* (1884), 10 P.R. 409, distinguished. *Re Fashion Shop Co.*, 253.

5. *Winding-up under Dominion Act — Foreign Company Doing Business in Canada—Jurisdiction—Prior Liquidation Proceedings Abroad—Distribution of Assets—Domestic and Foreign Creditors—Equality—Duty of Liquidator.*—The Winding-up Act, R.S.C. 1906, ch. 144, applies to all companies carrying on business in Canada.—A foreign company, which had carried on business in Canada, and was in liquidation in the Courts of the country of its origin, was being wound up in Ontario, under orders made by

the Supreme Court of Ontario, subsequent to the foreign liquidation and at the instance of the foreign liquidator. In the winding-up, claims were proved by both Canadian and foreign creditors:—*Held*, that the winding-up in Ontario was in no sense ancillary to the proceedings in the foreign Court; the assets in the hands of the Ontario liquidator should be distributed among all the creditors of the company *pro rata*—there was no warrant in the statute for giving preference to the claims of creditors residing in Canada; and that it was the duty of the Ontario liquidator to distribute the funds in his hands, and he could not discharge himself by remitting them to the foreign liquidator.—*Banco de Portugal v. Waddell* (1880), 5 App. Cas. 161, and *In re Klæbe* (1884), 28 Ch.D. 175, 177, referred to. *Re Breakwater Co.*, 65.

6. *Unsatisfied Judgment against —Action against Directors by Assignee of Claims for Wages of Servants—Companies Act, R.S.O. 1914, ch. 178, sec. 98—Agreement between Assignee and Company—Novation.*—The plaintiff recovered judgment against an incorporated company for the amount of a claim made up of balances due for wages, represented by cheques in favour of the company's workmen, the plaintiffs by an arrangement with the company supplying the men with goods, and cashing their pay-cheques. Execution having been issued and returned unsatisfied, this action was brought against directors of the company to en-

force a claim under sec. 98 of the Companies Act, R.S.O. 1914, ch. 178:—*Held*, that the money became payable to the plaintiff by virtue of his direct contract with the company when an adjustment took place and he accepted a cheque. There was then a novation, and under this new contract the plaintiff became a creditor of the company in respect of the cheques given to him, and the demands ceased to be demands for wages within the meaning of the statute.—*Lee v. Friedman* (1909), 20 O.L.R. 49, and *Olson v. Machin* (1912), 4 O.W.N. 287, 23 O.W.R. 531, considered. *Coveney v. Glendenning*, 571.

See CONSTITUTIONAL LAW — CONTRACT, 3—CRIMINAL LAW—EXECUTORS AND ADMINISTRATORS.

CONSTITUTIONAL LAW.

Corporations Tax Act, R.S.O. 1914, ch. 27, sec. 4 (3)—*Taxation of Insurance Companies—Premiums Received by Companies — Powers of Provincial Legislature—“Direct Taxation within the Province”—British North America Act, 1867, sec. 92 (2).*—The Corporations Tax Act, R.S.O. 1914, ch. 27, as amended by 4 Geo. V. ch. 11, in so far as it imposes a tax upon the gross premiums received by any insurance company in respect of business transacted in Ontario, including every premium which by the terms of the contract is payable in Ontario, or which is in fact paid in Ontario, or is payable in respect

to a risk undertaken in Ontario, or in respect of a person or property resident or situate in Ontario at the time of payment (clauses (a) and (e) of sec. 4 (3), as enacted by 4 Geo. V. ch. 11, sec. 2), is within the powers of the Ontario Legislature: the tax imposed comes within the words of sub-sec. 2 of sec. 92 of the British North America Act, 1867, “Direct Taxation within the Province.”—*Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575, explained and applied. *Treasurer of Ontario v. Canada Life Assurance Co.*, 433.

CONTRACT.

1. *Building Contract — Architect's Certificate — Non-conclusiveness—Terms of Contract—Collusion—Responsibility for Work Badly Done or Omitted.*—An architect's certificate may be made, by express agreement, final and binding on both the building owner and contractor, and in that sense conclusive as between them; but not so if the contract itself affords evidence that the certificate is not finally to settle the matters with which it deals, and does not absolve the contractor from responsibility for work badly done or omitted.—*Smallwood Brothers v. Powell* (1910), 1 O.W.N. 1025, followed. —And *held*, upon appeal from the judgment of a Referee, dismissing the action, that his findings, which were not attacked, afforded a complete answer to the contractor's claim against the building owner; that the architect's certificate was not conclu-

sive; and that the case was clearly one of fraudulent collusion. *Price v. Forbes*, 136.

2. *Municipal Corporation — Electric Light Company — Overhead System—Erection of Poles in Highways—45 Vict. ch. 19, sec. 2 —“Upon”—Condition Precedent —Making of Agreement—Delegation by Legislature to Municipal Authorities of Power to Grant or Withhold Right to Use Highways —“Franchise, Right, or Privilege”—Corporate Act — Discretion—Absence of Express Assent — Acquiescence — Estoppel — Lost Grant — Mistake — Agreement as to Underground System — Construction and Effect — Recitals — Limited Special Permission.]—*The judgment of MIDDLETON, J., 31 O.L.R. 387, restraining the defendant corporation from removing the plaintiff company's poles from certain city streets, was reversed; GARROW, J.A., dissenting.—Construction and effect of sec. 2 of 45 Vict. ch. 19, “An Act respecting Companies for supplying Electricity for the purposes of Light, Heat, and Power.”—*The Queen v. Justices of Lancashire* (1857), 8 E. & B. 563, applied.—*Ghee v. Northern Union Gas Co.* (1899), 158 N.Y. 510, 513, approved and applied.—*British Columbia Electric R.W. Co. Limited v. Stewart*, [1913] A.C. 816, 14 D.L.R. 8, explained and distinguished.—*Township of Pembroke v. Canada Central R.W. Co.* (1882), 3 O.R. 503, distinguished. *Toronto Electric Light Co. v. City of Toronto*, 267.

3. *Sale of Stock and Assets of Commercial Company — Ascer-*

*tainment of Amount Payable — Construction — Ambiguity — Recital—Evidence—Acts and Conduct of Parties—Contemporaneous Exposition—Election to Accept Interpretation of one Party—New Agreement — Estoppel — Rules for Interpretation of Contracts.]—*Certain provisions of the agreement in question being in conflict, evidence of what was done under the agreement was admitted to shew how the parties construed the bargain, and also to shew that in effect a new contract had been made by which the transaction was completed upon a certain footing; but evidence of negotiations and conversations antecedent to the agreement and of rejected draft agreements was not admitted to aid in the interpretation.—Discussion of the maxim *contemporanea expositio est optima et fortissima in lege* and its qualification.—A new contract, based upon the interpretation of the agreement put forward by the defendants, while the agreement was yet executory, which the plaintiffs' testator elected to accept, was in fact made; or the plaintiffs were estopped from now setting up any other as the true meaning of the agreement.—*Semble*, that an artificial rule, such as that an unambiguous contract cannot be modified by a mere recital, is to be invoked only as a last resort. *Toronto General Trusts Corporation v. Gordon Mackay & Co. Limited*, 183.

4. *Trade Agreement — Refusal to Enforce — Unreasonable En-*

hancement of Prices.—An injunction to restrain the defendant from selling goods of the plaintiffs' manufacture except at prices mentioned in an agreement between them, was refused, where the stipulations imposed by the vendor-plaintiffs were such as unreasonably to enhance the price to the purchasing public: the element of crime came in and affected the freedom of contract.—*Wampole & Co. v. F. E. Karn Co. Limited* (1906), 11 O.L.R. 619, followed.—*Elliman Sons & Co. v. Carrington & Son Limited*, [1901] 2 Ch. 275, not followed. *Stearns v. Avery*, 251.

See COMPANY, 2, 6—FRAUDULENT CONVEYANCE—INFANTS, 1—INSURANCE—LIMITATION OF ACTIONS—MUNICIPAL CORPORATIONS, 2—PRINCIPAL AND AGENT—VENDOR AND PURCHASER.

CONTRIBUTORY NEGLIGENCE.

See HIGHWAY, 2—MASTER AND SERVANT, 1—MINES AND MINERALS—RAILWAY, 2.

CORPORATIONS TAX ACT.

See CONSTITUTIONAL LAW.

CORROBORATION.

See FRAUDULENT CONVEYANCE.

CORRUPT PRACTICES.

See MUNICIPAL ELECTIONS, 1.

COSTS.

1. *Appeal — Incorrect Material.*—Where the material fur-

nished to the Court by the appellants upon an appeal was incorrect, it was *held*, by FALCONBRIDGE, C.J.K.B., and RIDDELL, J., that the appellants, though successful, should be deprived of the costs of the appeal, as in *Re Stinson and College of Physicians and Surgeons of Ontario* (1912), 27 O.L.R. 565. *Devitt v. Mutual Life Insurance Co. of Canada*, 473.

2. *Incidence of—Action against two Defendants — Both Held Liable at Trial — Reversal of Judgment on Appeal by one Defendant—Liability of Remaining Defendant for Costs of Plaintiffs Occasioned by Joining both.*—By the judgment of MIDDLETON, J., at the trial, 31 O.L.R. 405, both defendants—the town corporation and the telephone company—were held liable to the plaintiffs. The telephone company appealed, and was exonerated from liability. The municipal corporation did not appeal, but was made a respondent to the telephone company's appeal; in its statement of defence and at the trial it contended that the act of the telephone company was the *causa causans* of the death of the deceased, and that the company and not the corporation was liable to the plaintiffs:—*Held*, that it was reasonable for the plaintiffs to join the company as a defendant, and that the costs to be received by the plaintiffs from the corporation should include all costs incurred against the company by reason of there being two defendants, and also the costs which the plaintiffs would have to pay

to the company.—*Besterman v. British Motor Cab Co.*, [1914] 3 K.B. 181, followed. *Till v. Town of Oakville*, 120.

3. *Incidence of—Third Party Proceedings—Discretion of Trial Judge—Appeal—Unreasonable Defence—Indemnity.*]—In an action for negligence, judgment was given against the defendants with costs, and with relief over against two third parties, but no costs of the third party proceedings were allowed:—*Held*, upon appeal by the defendants and one of the third parties, that costs are in the discretion of the trial Judge; and, if the defence, however *bonâ fide*, be unreasonable, the party so offending is not entitled to be recouped his costs by another to whom he looks for indemnification: the defendants should not have contested the claim of the plaintiffs, but should have paid without suit, and might then have sued the third parties, if so advised. *Wolsely Tool and Motor Car Co. v. Jackson Potts & Co.*, 96, 587.

See EXECUTION, 1 — MORTGAGE, 1—NEGLIGENCE—PRINCIPAL AND AGENT, 1—SOLICITOR.

COUNTY COURT JUDGE.

See CANADA TEMPERANCE ACT — MUNICIPAL CORPORATIONS, 5 — MUNICIPAL ELECTIONS, 2.

COUNTY COURTS.

See APPEAL, 1.

COURTS.

See APPEAL — DIVISION COURTS.

COVENANT.

See DEED.

CREDITORS.

See ASSIGNMENTS AND PREFERENCES—COMPANY, 4, 5—INSURANCE, 2.

CREDITORS RELIEF ACT.

See MORTGAGE, 2.

CRIMINAL LAW.

Director of Company — False Statement Made to Bank—Criminal Code, sec. 414—Statement as to Director's own Affairs — Responsibility as Guarantor — "Prospectus" — Obtaining Credit by False Pretences — Criminal Code, sec. 405A.]—The defendant, being a director of an incorporated commercial company, and being offered by the company as surety for a proposed loan from a bank, gave a personal guaranty to the bank on behalf of the company, and also a statement of his own affairs which, to his knowledge, was untrue:—*Held* (MAGEE, J.A., dissenting), that this did not constitute the offence mentioned in sec. 414 of the Criminal Code.—Remarks on the history of sec. 414 and the effect of the introduction of the word "prospectus."—But *held* (HODGINS, J.A., dissenting), that there was evidence for the jury of an offence against sec. 405A. of the Criminal Code: the defendant incurred a liability on his guaranty to the bank, and, in incurring it, obtained credit, within the meaning of the section, on the faith of the statement which he made as to

his financial position.—*Regina v. Boyd* (1896), 4 Can. Crim. Cas. 219, *Regina v. Bryant* (1899), 63 J.P. 376, *Regina v. Jones* (1898), 19 Cox C.C. 87, and *Rex v. Campbell* (1912), 5 D.L.R. 370, 19 Can. Crim. Cas. 407, considered. *Rex v. Cohen*, 340.

See LIQUOR LICENSE ACT.

CROSSINGS.

See RAILWAY.

CROWN ATTORNEY.

See MALICIOUS PROSECUTION.

CUSTODY OF CHILD.

See INFANTS, 1.

CUSTOMS BROKER.

See PRINCIPAL AND AGENT, 1.

DAMAGES.

See JUDGMENT, 1—PRINCIPAL AND AGENT, 1—SALE OF GOODS—VENDOR AND PURCHASER.

DEATH.

See FACTORY SHOP AND OFFICE BUILDING ACT — INSURANCE — LUNATIC — MASTER AND SERVANT, 1, 2—MINES AND MINERALS—NEGLIGENCE.

DECLARATORY JUDGMENT.

See MUNICIPAL CORPORATIONS, 3.

DEDICATION.

See DEED.

DEED.

Construction — Building Scheme — Conveyances of Build-

ing Lots in Park — "Access to Streets, Avenues, Terraces, and Commons"—Meaning of "Commons"—Unenclosed Spaces on Plan—Absence of Designation—Covenant — Quasi-dedication — Easement—Purchaser for Value without Notice—Evidence.]—The judgment of MIDDLETON, J., 30 O.L.R. 289, was affirmed.—At the hearing of the appeal further evidence was (by consent) taken upon the question whether the petitioner was a *bonâ fide* purchaser for value without notice, and that question was determined against him. — Discussion of the effect of the covenants in conveyances to purchasers, using the word "commons;" and review of the authorities.—*Renals v. Cowlishaw* (1878-9), 9 Ch.D. 125, 11 Ch.D. 866, and *Spicer v. Martin* (1888), 14 App. Cas. 12, specially referred to. *Re Lorne Park*, 51.

See FRAUDULENT CONVEYANCE.

DEFECTIVE SYSTEM.

See MINES AND MINERALS.

DIRECTORS.

See COMPANY, 2, 6—CRIMINAL LAW.

DISCOVERY.

Examination of Person for whose Immediate Benefit Action Prosecuted—Action for Benefit of Intestate's Estate—Interest of Next of Kin—Rule 334—Affidavit.]—In an action by the administrators of the estate of a deceased intestate to recover from the defendant money and property in his hands alleged to form part of

the estate of the deceased, it was *held*, that a sister of the intestate, who, it was said, was entitled to one-third of his estate, was not a person for whose immediate benefit the action was prosecuted, and was not, therefore, examinable by the defendant, for discovery under Rule 334. If she should receive any benefit from the action, it would be received mediately and not immediately. — *Stow v. Currie* (1909), 14 O.W.R. 223, 224, followed.—*Macdonald v. Norwich Union Insurance Co.* (1884), 10 P.R. 462, and *Garland v. Clarkson* (1905), 9 O.L.R. 281, distinguished.—The affidavit filed in support of an application for an order for the examination of the sister was *held* insufficient, because it did not state that the action was prosecuted for her immediate benefit, but only that she would derive material advantage from the plaintiffs' success: the affidavit should follow the language of the Rule. *Trusts and Guarantee Co. v. Smith*, 155.

DISCRETION.

See CONTRACT, 2—COSTS, 3—WILL, 2.

DISQUALIFICATION.

See MUNICIPAL ELECTIONS, 1.

DISTRIBUTION OF ESTATES.

See EXECUTORS AND ADMINISTRATORS.

DISTRICT COURTS.

See APPEAL, 1.

DITCHES AND WATERCOURSES ACT.

Construction of Drain—Award—Infant's Land—Notice Served on Infant's Father—“Guardian of an Infant”—R.S.O. 1897, ch. 285, secs. 3, 8—*Invalidity of Proceedings—Fundamental Defect.*]—The guardian intended by the interpretation clause (sec. 3) of the Ditches and Watercourses Act, R.S.O. 1897, ch. 285, is such a guardian as has by law the management and control of the infant's land, and not merely the guardian of his person; and notice of proceedings under the Act, given to the father of an infant whose land was affected by the proceedings—the father not having been appointed guardian of the infant's estate—was *held* insufficient to satisfy sec. 8 of the Act, which requires notice to be given to every “owner;” and the result was, that the infant was not properly made a party to the proceedings, and was not bound by the award, and the whole drainage scheme fell to the ground. — Judgment of MIDDLETON, J., 32 O.L.R. 184, reversed. *Healy v. Ross*, 368.

DIVISION COURTS.

Appeal—Evidence Taken at Trial—Duty of Judge—Division Courts Act, sec. 106.]—Where an action in a Division Court comes under secs. 62 (d) and 106 of the Division Courts Act, R.S.O. 1914, ch. 63, and the judgment therein is appealable under sec. 125 (a), it is the duty of the Judge at the trial to “take down the evidence in writing” (sec. 106).

This duty is not to be disregarded; and "notes of evidence" are not "the evidence" which the Judge is required to take down, unless these notes are so full as to shew the substance of what was said. *Barrett v. Phillips*, 203.

EASEMENT.

See DEED—HIGHWAY, 1.

ELECTION.

See CONTRACT, 3—EXECUTORS AND ADMINISTRATORS—SALE OF GOODS.

ELECTIONS.

See MUNICIPAL ELECTIONS.

ELECTRIC LIGHT COMPANY.

See CONTRACT, 2.

ELECTRIC RAILWAY.

See RAILWAY, 1.

ENCROACHMENT.

See INFANTS, 2.

ESTOPPEL.

See ASSIGNMENTS AND PREFERENCES, 2 — COMPANY, 1 — CONTRACT, 2, 3 — FRAUDULENT CONVEYANCE—WILL, 1.

EVIDENCE.

Motion before Divisional Court of Appellate Division — Examination of Witnesses—Leave of Court—Necessity for—Appointment.]—Where a party making a motion to a Divisional Court of the Appellate Division proposes to read at the hearing of the motion the depositions of certain

witnesses to be taken, he must obtain leave from the Divisional Court to examine the witnesses; an appointment issued without leave for their examination is irregular and will be set aside.—*Trethewey v. Trethewey* (1907), 10 O.W.R. 893, approved and followed. *Crowley v. Boving and Co. of Canada*, 491.

See BILLS AND NOTES, 1—CONTRACT, 3 — DEED — DISCOVERY — DIVISION COURTS — FACTORY SHOP AND OFFICE BUILDING ACT — FRAUDULENT CONVEYANCE — INSURANCE, 4 — MALICIOUS PROSECUTION—MASTER AND SERVANT, 2 — MINES AND MINERALS — MUNICIPAL ELECTIONS, 1 — NEGLIGENCE — SOLICITOR—TRADE MARK.

EXAMINATION OF PARTIES.

See DISCOVERY.

EXECUTION.

1. *Judgment — Satisfaction — Interpleader Issue — Judgments Recovered for Instalments of Purchase-price of Mill — Resale of Mill by Vendor—Sale of Interest in Land or of Chattel—Effect upon Judgments — Costs — Interpleader Bond—Rights of Execution Creditors—Limitation.*]—In an action by McP. and B. upon an interpleader bond (the interpleader having been decided in favour of the plaintiffs McP. and B.—*McPherson v. Temiskaming Lumber Co.*, [1913] A.C. 145) and upon an issue directed to be tried for the purpose of determining whether the judgment recovered by McP. had been satisfied in whole or in part, it was held, by

MIDDLETON, J., the trial Judge, following *Lavery v. Pursell* (1888), 39 Ch.D. 508, that the mill was to be regarded as land; and, following *Cameron v. Bradbury* (1862), 9 Gr. 67, and *Gibbons v. Cozens* (1898), 29 O.R. 356, that by reselling McP. had precluded himself from afterwards proceeding upon his judgments, even for the balance of his claim after crediting the \$1,750; but had not precluded himself from enforcing the judgments for the costs thereby awarded. And therefore the executions in respect of the instalments should be directed to be withdrawn, and the executions with respect to costs should be declared to remain in force.—Upon appeal, the four Judges composing a Divisional Court of the Appellate Division were equally divided in opinion.—*Held*, also, by MIDDLETON, J., and affirmed by the Divisional Court, that the liability of the obligors upon the interpleader bond was not confined to the amount remaining due on the executions of McP. and B.—other creditors having executions in the sheriff's hands were entitled to share in the fund represented by the bond. *McPherson v. United States Fidelity and Guaranty Co.*, *McGuire v. McPherson*, 524.

2. *Life of Judgment—Limitations Act*, 10 Edw. VII. ch. 34, sec. 49 — “*Proceeding*” — “*Action*” — *Presumption of Payment* — *Renewal of Fi. Fa.* — *Ministerial Act* — *Rule 571.*] — The right to renew a writ of *fi. facias* issued upon a judgment, within

six years after the recovery thereof, and kept alive by renewals, is not barred by sec. 49 of the Limitations Act, 10 Edw. VII. ch. 34, at the expiration of twenty years from the recovery of the judgment (in the absence of part payment or acknowledgment): the interpretation clause of the Act, sec. 2 (a), does not extend the meaning of the word “*action*,” as used in sec. 49, so as to include the proceeding by which a writ is renewed.—Difference between the language of sec. 23 of R.S.O. 1897, ch. 133, and that of sec. 49, above referred to, pointed out, and cases decided under sec. 23 or its prototype, distinguished: *Caspar v. Keachie* (1877), 41 U.C.R. 599; *Neil v. Almond* (1897), 29 O.R. 63; *In re Woodall* (1904), 8 O.L.R. 288; *McDonald v. Grundy* (1904), 8 O.L.R. 113.—The amendment of sec. 23 by 5 Edw. VII. ch. 13, sec. 10, afterwards embodied in sec. 24 (2) of 10 Edw. VII. ch. 34, did away with the effect of the cases referred to, at all events where the execution debtor was possessed of land upon which the execution operated as a lien or charge.—The common law rule for presuming payment of a specialty after twenty years is no longer applicable.—History of the legislation.—In this case, the plaintiff having issued execution in due time, no application for leave to issue execution was necessary; the renewal after the expiration of the twenty years was a mere ministerial act on the part of the officer of the Court by

whom it was renewed, whose duty it was to sign the memorandum required by Rule 571 of the Rules of 1913, when the plaintiff produced the execution, while, according to its terms, it was still in force, and requested him to sign it.—*Price v. Wade* (1891), 14 P.R. 351, distinguished. *Poucher v. Wilkins*, 125.

See MORTGAGE, 2.

EXECUTORS AND ADMINISTRATORS.

Distribution of Estate of Intestate — Duty of Administrator — Trustee and Cestui que Trust — Shares in Industrial Company — Election of two Beneficiaries to Take Shares in Specie — Refusal of Third to Consent — Remaining Beneficiaries under Disability — Advice and Direction of Court — Sale and Conversion of Estate — Statute of Distributions.]—After payment of debts, the administrator of the estate of an intestate holds the estate in trust to convert and divide among those entitled under the statute to distribution, as an executor holds an estate in trust under a will when he is directed to convert and distribute among several residuary legatees. An intestate's next of kin are entitled to elect to take the estate in specie. But until distributed the assets which are the subject of the trust are not the property of the beneficiary.—*Cooper v. Cooper* (1874), L.R. 7 H.L. 53, and *Sudeley v. Attorney-General*, [1897] A.C. 11, followed. — Where the parties beneficially entitled are not of one mind, those of them who so

desire are entitled to insist upon the normal course of administration being pursued to the end. There can be no divergence from the statutory testament which would injuriously affect the right of any one *cestui que trust*.—Review of the authorities.—*In re Marshall*, [1914] 1 Ch. 192, specially referred to.—Where the estate of an intestate consisted of practically the whole of the capital stock of an industrial company, and his next of kin were his widow and four children, two of whom were infants, and where it appeared that the widow and the eldest son, who were together entitled to one half the estate, desired to take their aliquot portions of the company-shares, but the adult daughter desired that there should be no partition of the stock, but that it should be held by the administrator until a realisation could take place at a fair price, it was held, that it was the duty of the trustee to refuse to transfer any portion of the stock to the beneficiaries unless all agreed. The statute directs a sale and conversion; and, in the absence of consent, this must govern. *Re Harris*, 83.

EXECUTORY CONSIDERATION.

See BILLS AND NOTES, 2.

FACTORY SHOP AND OFFICE BUILDING ACT.

3 & 4 Geo. V. ch. 60—*Contra-vention*—*Absence of Fire-escapes and Presence of Inflammable Material*—*Lives Lost in Burning*

Building — Failure to Connect Deaths with Contravention — Evidence.]—Proof of the contravention of the Factory Shop and Office Building Act, 3 & 4 Geo. V. ch. 60 (now R.S.O. 1914, ch. 229)—as in this case by shewing that the defendant's building, in which the husbands of the plaintiffs were employed, was not provided with fire-escapes (sec. 59) and that combustible or inflammable material was kept therein (sec. 56)—and that a person lost his life in the building when it was burnt, is not enough to entitle his personal representatives or dependents to recover damages for his death; but there must be, in addition, reasonable evidence to warrant the conclusion that the death resulted from the contravention; and in this case the plaintiffs failed because of the absence of that evidence. — The absence from the Act of any such provision as sec. 17 of the Imperial Merchant Shipping Act, 1873, pointed out, and Admiralty cases such as *The Fanny M. Carvill* (1875), 13 App. Cas. 455 (note), distinguished. *Birch v. Stephenson*, *McDougall v. Stephenson*, 427.

"FAIR WAGE."

See MUNICIPAL CORPORATIONS, 2.

FALSE PRETENCES.

See CRIMINAL LAW.

FIERI FACIAS.

See EXECUTION.

FIRE INSURANCE.

See PRINCIPAL AND AGENT, 2.

FOREIGN COMPANY.

See COMPANY, 5.

FOREIGN CURATOR.

See MORTGAGE, 1.

FORGERY.

See MALICIOUS PROSECUTION.

FORISFAMILIATION.

See WILL, 2.

FRANCHISE.

See CONTRACT, 2.

FRAUD AND MISREPRESENTATION.

See COMPANY, 2, 3—INSURANCE, 1.

FRAUDULENT CONVEYANCE.

Reconveyance by Wife to Husband of Land Conveyed by Husband to Wife—Parol Agreement to Reconvey — Evidence — Corroboration—Intent—Findings of Fact of Trial Judge—Appeal — Estoppel.]—In an action against a man and his wife, brought by execution creditors of the wife, to set aside, as fraudulent and void as against the plaintiffs and the wife's other creditors, a conveyance of two parcels of land made by the wife to the husband, it appeared that the land was originally the husband's, was conveyed by him to his wife on the 13th April, 1914, and reconveyed to the husband on the 30th June, 1914: — *Held* (GARROW,

J.A., dissenting), that the judgment of LATCHFORD, J., dismissing the action, should be affirmed.—The question of the intent with which the reconveyance was made was a question of fact.—There is no rule of law which renders it impossible to uphold such a transaction as that in question because of the absence of evidence corroborating the testimony of the parties to the transaction. — The evidence did not warrant the application of the doctrine of estoppel. The person to be estopped was the husband, not the wife; and there was no satisfactory evidence that the husband was a party to the alleged representation of the wife that the land was hers, or that he was present when it was made. *Windsor Auto Sales Agency v. Martin*, 354.

GIFT.

See LUNATIC—WILL.

GOVERNOR IN COUNCIL.

See CANADA TEMPERANCE ACT.

GUARANTY.

See CRIMINAL LAW.

GUARDIAN.

See DITCHES AND WATER-COURSES ACT—INFANTS, 2.

HABEAS CORPUS.

See ALIEN ENEMY.

HIGHWAY.

1. *Municipal By-law Authorising Closing and Sale of Un-*

*opened Street as Shewn on Plan—Registration of Plan — Sale of Lots Fronting on Street—Surveys Act, 1 Geo. V. ch. 42, sec. 44—Municipal Act, 1903, secs. 601, 607, 637 (1)—Effect of Exemption of Township Corporation from Obligation to Keep in Repair — Easements—Effect of Non-user—Public and Private Interests—Bona Fides — Exclusion of Land-owners from Access to Lands—Municipal Act, sec. 629 (1) — Sale by Council without Offering to Abutting Owners—Sec. 640 (11) of Act—Quashing Part of By-law.]—M. street, as shewn upon a plan registered in 1873, with lots abutting upon it, which were sold, was held to be a public highway, though never opened as such; and it was also held, that a municipal by-law, passed in 1913, closing up the street, was passed in good faith and in the public interest, and was valid so far as related to the closing; but a further provision of the by-law, authorising the sale and conveyance of the *situs* of the street, was quashed, upon the ground that the municipal council had no power to sell the *situs* without first offering it to the abutting owners at a price fixed by the council.—The following provisions of Ontario statutes were considered: sec. 44 of the Surveys Act, 1 Geo. V. ch. 42; 60 Vict. ch. 27, sec. 20, amending the former Surveys Act; secs. 601, 607, 629 (1), 637 (1), and 640 (11), of the Municipal Act, 1903, 3 Edw. VII. ch. 19.—*Gooderham v. City of Toronto* (1895), 25 S.C.R. 246, explained*

and distinguished. — *Roche v. Ryan* (1892), 22 O.R. 107, approved.—*United Buildings Corporation v. Corporation of the City of Vancouver*, [1915] A.C. 345, applied. — *In re McArthur and Township of Southwold* (1878), 3 A.R. 295, followed.—*Cameron v. Wait* (1878), 3 A.R. 175, 180, distinguished. *Jones v. Township of Tuckersmith, Re Jones and Township of Tuckersmith*, 634.

2. *Nonrepair — Injury to Traveller — Road Assumed by County Corporation — Highway Improvement Act, R.S.O. 1914, ch. 40, sec. 19—Duty to Repair and Maintain — Negligence—Absence of Guard-rail at Dangerous Place—Liability of County Corporation—Limits of Road—Contributory Negligence—Findings of Trial Judge—Appeal.* — The judgment of MEREDITH, C.J.C.P., 32 O.L.R. 423, was affirmed. *Ackersviller v. County of Perth*, 598.

See CONTRACT, 2 — RAILWAY, 2.

HIGHWAY IMPROVEMENT ACT.

See HIGHWAY, 2.

HUSBAND AND WIFE.

See INFANTS, 1.

ILLEGALITY.

See CONTRACT, 4.

IMPROVEMENTS.

See WILL, 1.

INDEMNITY.

See COSTS, 3.

INFANTS.

1. *Custody of Infant — Husband and Wife — Separation Agreement — Provision Giving Wife Custody of Child with "Right of Access" by Husband—Construction.*—By a separation agreement, charge and control of the child of the marriage, a girl under three years of age, were given to the wife; the husband was to have access to the child at any reasonable time, upon notice:—*Held*, that there was nothing to justify the giving of the custody to the father, and it was in the interest of the child that it should remain in the mother's custody.—(2) That, under the agreement, the father was entitled to access to the child only while it was in the mother's custody and control; and, in the absence of any stipulation therefor in the agreement, it could not be said that the mother was guilty of any breach of its provisions by remaining in the room in her house in which the father was permitted to see the child, during the times of the father's visits.—The meaning of "right of access" considered.—*Evershed v. Evershed* (1882), 46 L.T.R. 690, and *Rice v. Frayser* (1885), 24 Fed. Repr. 460, referred to. *Re M., an Infant*, 515.

2. *Maintenance out of Funds in Hands of Guardian — Encroachment upon Capital — Power of Court—Infants Act, R.S.O. 1914, ch. 153, sec. 31 (2)—Practice—Application at Chambers upon Originating Notice—Order Authorising Payment of Moneys to Mother of Infants.*—The Court

has power to enforce the duty of any guardian or other trustee to maintain and educate infant children according to their needs and means; and has power over the person and property of an infant, which power ought to be freely exercised for the benefit of the infant whenever necessary.—An order was made by a Judge in Chambers, upon the application of the mother of two infants (girls), who resided with her, authorising the guardians of the infants to pay to the applicant, out of the infants' moneys in their hands—largely out of the corpus, the income being insufficient—the same allowance for the infants' maintenance and education that had been paid for a limited time under a previous order, so long as past conditions as to maintenance and education should continue, up to the time of each infant, respectively, attaining the age of 21 years or marrying.—*Re Carnahan* (1912), 4 O.W.N. 115, considered.—The application was regularly made at Chambers, by way of originating notice of motion; and equally so whether the guardians were assenting or dissenting—there being no question involved respecting the power of the Court, or the right of the infants to the property in question: Infants Act, R.S.O. 1914, ch. 153, sec. 31 (2). *Re Adkins Infants*, 110.

See DITCHES AND WATER-COURSES ACT.

INJUNCTION.

See CANADA TEMPERANCE ACT.

INQUIRY.

See MUNICIPAL CORPORATIONS, 5.

INSURANCE.

1. *Animal Insurance — Mis-statements of Fact in Application-form Filled in by Agent of Insurer, without Knowledge of Assured — Construction of Application and Policy — Adoption of Insurer's Agent as Agent of Assured—Fraud of Agent—Mistake in Proofs of Loss.*—*Held*, in an action to recover the amount of an insurance upon an animal, that the provisions contained in the application and policy were to be read together, and most strongly against the defendants; and, so read, the policy was to be void only on the untrue statement of the assured, and not of one who was in fact the agent of the defendants, though technically perhaps and for a special purpose acting for the assured. — *Semble*, that the insurer cannot take advantage of the clause making the insurance agent agent for the applicant where the applicant is misled by the agent's fraud; and, if *Hastings Mutual Fire Insurance Co. v. Shannon* (1878), 2 S.C.R. 394, and *Biggar v. Rock Life Assurance Co.*, [1902] 1 K.B. 516, are in conflict, the former case should be followed.—And *held*, that there was no fraud but only mistake in the proofs of loss.—The fraud of the agent could not be imputed to the plaintiff, and he was entitled to recover. *Dowdy v. General Animals Insurance Co.*, 258.

2. *Life Insurance — Benevo-*

lent Society—Contract of Insurance—Payment to Member on Attaining Certain Age—Power of Society to Alter Contract—Amendment of Laws of Society — R.S.O. 1877, ch. 167, sec. 4—3 Edw. VII. ch. 15, sec. 8—Fundamental Incorporation Declaration—Right of Member as Creditor—Beneficiary Fund—Life Expectancy Fund.—The judgment of MEREDITH, C.J.C.P., 31 O.L.R. 461, was affirmed.—*Held*, that a right had accrued to the plaintiff which made him a creditor of the defendants, and therefore entitled to enforce his right by action, before the amendment of 1914 was made by the defendants.—The fundamental incorporation declaration was not alterable under the powers given by the Act respecting Benevolent, Provident, and other Societies, R.S.O. 1877, ch. 167, sec. 4, nor under the powers in the defendants' constitution; and there was no power under the Act 3 Edw. VII. ch. 15, sec. 8, amending the Insurance Act, to postpone or change the expectancy age already fixed, as the amendment of 1914 purported to do.—*Bartram v. Supreme Council of The Royal Arcanum* (1905), 6 O.W.R. 404, followed.—*In re Ontario Insurance Act and Supreme Legion Select Knights of Canada* (1899), 31 O.R. 154, distinguished.—*Held*, also, that the plaintiff's rights were not limited to payment of his debt out of a part of the "Beneficiary Fund" or out of the "Life Expectancy Fund"—he was entitled to be paid the amount awarded by the judgment below without dis-

crimination as to the source of payment. *Grainger v. Order of Canadian Home Circles*, 116.

3. *Life Insurance — Policy — Non-forfeiture Clause—Construction—"Cash Surrender Value"—Determination by Insurance Company at Stated Periods—Promissory Note Given for Part of Premium—Non-payment — Renewal.*—*Held* (reversing the judgment of BRITTON, J., 33 O.L.R. 68), that "the cash surrender value" mentioned in clause 9 of the defendants' policy upon which the plaintiff sued—clause 9 providing for non-forfeiture in the event of default in payment of any premium if the cash surrender value should exceed the amount of such premium—was the cash surrender value mentioned in the table of guaranteed loan and surrender values which followed clause 10 in the policy; that the defendants had the right to fix and had fixed the surrender value for the purposes of the policy at the end of every year; and that the surrender value fixed at the end of any one year continued to be the surrender value until increased at the end of the next year, according to the table.—*Held*, also, that the defendants were entitled to succeed upon the defence that a promissory note, made by the assured and not paid at maturity, was "given for any premium or part thereof," within the meaning of another clause in the policy, although it was in fact made in part renewal of an earlier note which was undoubtedly given in part payment

of a premium. — *McGeachie v. North American Life Assurance Co.* (1894), 23 S.C.R. 148, followed. *Devitt v. Mutual Life Insurance Co. of Canada*, 473.

4. *Life Insurance — Proof of Death of Insured — Waiver — Authority of Chief Officer of Society—Presumption of Death—Absence of Seven Years — Evidence—New Trial.*—The beneficiary under a certificate or policy of insurance upon the life of her husband, issued by the defendants in 1905, by which the sum of \$1,000 was made payable to her within thirty days after proof of his death and of the manner of its occurrence, brought this action to recover the sum named, alleging that her husband had disappeared on the 9th July, 1907, and had not since been heard of or from by her, although she had endeavoured to find him, and that on and after the 9th July, 1914, he must be presumed to be dead:—*Held*, that the Chief Ranger of the defendants, by reason of the duty imposed upon him by the defendants' constitution to "see that justice is done to all parties," had authority to waive the production of formal proof of the death of the plaintiff's husband, and had done so by his correspondence with the plaintiff's solicitors.—A new trial was directed. *Linke v. Canadian Order of Foresters*, 159.

See CONSTITUTIONAL LAW — PLEADING — PRINCIPAL AND AGENT, 2.

INTEREST.

See MORTGAGE, 1—WILL, 2.

INTERPLEADER.

See EXECUTION, 1.

INTOXICATING LIQUORS.

See CANADA TEMPERANCE ACT — LIQUOR LICENSE ACT.

JOINDER OF PARTIES.

See COSTS, 2.

JUDGMENT.

1. *Action on—Limitation of Right—Damages for Breach of Directions in Judgment.*—To be available as a cause of action, a judgment must be a definitive personal judgment for the payment of money, final in its character, and not merely interlocutory, remaining unsatisfied and capable of immediate enforcement—a judgment of a character which would have supported an action of debt under the old forms of procedure.—And where the judgment upon which the plaintiff sued was not a judgment for the payment of a sum of money, either certain or uncertain—and the action was in reality an action to recover damages for an alleged breach by the defendant of the directions of the judgment sued upon, in that the defendant did not, as the judgment directed, permit the plaintiff to remove his bees and honey from the defendant's land, whereby the bees died and the honey became useless—it was *held*, that the action did not lie. *Parks v. Simpson*, 382.

2. *Summary Judgment — Action for Money Demand—Specially Endorsed Writ of Summons—Affidavit of Defendant — Insufficiency — Rules 56, 57.*—Where, in an action brought in a District Court to recover the price of wood sold and delivered by the plaintiff to the defendant, the affidavit filed by the defendant with his appearance stated that he had “a good defence on its merits” to the action, and that the quality of the wood supplied to him, for which the plaintiff claimed payment, was not such as the plaintiff agreed to deliver, and that the plaintiff did not deliver the amount of wood for which he claimed payment:—*Held*, that the object of the requirement of Rule 56 that a defendant shall, besides depositing that he has a good defence on the merits, also in his affidavit shew “the nature of his defence, with the facts and circumstances which he deems entitle him to defend the action,” is that the Court may see whether the facts and circumstances on which he relies afford an answer to the plaintiff’s claim; if they do not, the affidavit is not a bar to the making of an order for summary judgment under Rule 57; and in this case, to make the affidavit a sufficient one, the defendant should have shewn what reduction he claimed in respect of the objection to the quality of the wood and the quantity that was not delivered. *Carter v. Hicks*, 149.

3. *Summary Judgment—Rules 56, 57—Specially Endorsed Writ*

of Summons — Affidavit Filed with Appearance — “Good Defence upon the Merits” — Defective Affidavit—Leave to Apply for Permission to File Proper Affidavit—Duty of Officer of Court Receiving Appearance.—The affidavit of the defendant required by Rule 56 must state “that he has a good defence upon the merits.” An affidavit reading, “I have a good defence to this action,” does not comply with the Rule.—*Robinson v. Morris* (1908), 15 O.L.R. 649, followed.—An order for summary judgment, under Rule 57, for the amount of the plaintiff’s claim, as specially endorsed upon the writ of summons, was affirmed, subject to leave reserved to the defendant to make a substantive application for permission to file a proper affidavit.—*Per RIDDELL, J.*:—Rule 56 requiring that the appearance shall not be received without an affidavit, and that the affidavit shall contain a statement that the defendant “has a good defence upon the merits,” a Court officer should not receive an appearance unless the affidavit does contain that statement. *Leushner v. Linden*, 153.

See COMPANY, 6—EXECUTION—MECHANICS’ LIENS — MUNICIPAL CORPORATIONS, 3—PRINCIPAL AND AGENT, 3.

JUDICIAL SALE.

See MORTGAGE, 2.

JURISDICTION.

See ALIEN ENEMY—ASSIGNMENTS AND PREFERENCES, 1—

CANADA TEMPERANCE ACT—COMPANY, 5—LUNATIC—MUNICIPAL CORPORATIONS, 1, 2, 5—MUNICIPAL ELECTIONS, 2—PROVINCIAL BOARD OF HEALTH.

JURY.

See MASTER AND SERVANT, 1, 2—MINES AND MINERALS—RAILWAY, 1, 2.

LANDLORD AND TENANT.

See COMPANY, 4.

LICENSE FEES.

See MUNICIPAL CORPORATIONS, 1.

LIEN.

See COMPANY, 4—MECHANICS' LIENS.

LIFE INSURANCE.

See INSURANCE, 2, 3, 4—PLEADING.

LIMITATION OF ACTIONS.

Possession of Land—Tenancy at Will—Statutory Title—Limitations Act, R.S.O. 1914, ch. 75, sec. 6, sub-secs. 6, 7—Payment of Taxes to Municipal Authority—Parol Agreement—Payment as Rent—Acknowledgment—Outstanding Title of Mortgagee—Conveyance Absolute in Form Treated as Mortgage—Sec. 23 of Act.—The defendant being, as the result of an agreement, a mere tenant at will of the land in question, and nothing being shewn to have subsequently occurred to alter or enlarge his title, the result was the same if the

tenancy was or subsequently became a tenancy for a year, or from year to year, the lease having been by parol: Limitations Act, R.S.O. 1914, ch. 75, sec. 6, sub-secs. 6, 7.—*Day v. Day* (1871), L.R. 3 P.C. 751, applied and followed.—As there was an express agreement by the defendant to pay the taxes as rent, no other rent having been stipulated for, the amounts so paid were really paid as rent within the meaning of the statute—the payment amounted unequivocally to an acknowledgment of the plaintiff's title—and so prevented the statutory bar from accruing.—*Finch v. Gilray* (1889), 16 A.R. 484, distinguished.—D., to whom the land had been conveyed by a deed absolute in form, but intended only as security for a debt, was in the same position as a mortgagee, and, while his title was outstanding and payments being made, the statute was inoperative against him or any person claiming under him: sec. 23.—*Noble v. Noble* (1912), 27 O.L.R. 342, distinguished. *East v. Clarke*, 624.

See EXECUTION, 2—WILL, 1.

LIQUIDATOR.

See COMPANY, 4, 5.

LIQUOR LICENSE ACT.

Sale of Beer by Brewer in Local Option Town—Purchaser not a Licensee—Meaning of "Sell" in R.S.O. 1914, ch. 215, sec. 155.—The defendant was the holder of a brewer's provincial license, and carried on the business of a

brewer in a town where a local option by-law was in force. F., who lived outside the town, and was not a licensee under the Liquor License Act, sent to the defendant's brewery a messenger who ordered and paid for two dozen bottles of beer to be sent to F.'s house, outside the town. The beer was not then and there appropriated to the order; the defendant delivered it at F.'s house on the following day:—*Held*, that there was a "sale" at the town, within the meaning of the Ontario Act respecting Brewers' and Distillers' and other Licenses, 62 Vict. ch. 31, sec. 4, as amended by 9 Edw. VII. ch. 82, sec. 47, and 1 Geo. V. ch. 64, sec. 16 (see now sec. 155 of the Liquor License Act, R.S.O. 1914, ch. 215), which forbids such a sale in a municipality in which a local option by-law is in force; and the defendant was properly convicted of an offence against the Liquor License Act.—The word "sell" as used in the statute should not be so interpreted as to mark a rigid distinction between an agreement to sell and a completed sale.—*Lambert v. Rowe*, [1914] 1 K.B. 38, applied. *Rex v. Wright*, 237.

LOST GRANT.

See CONTRACT, 2.

LUNATIC.

Order Declaring Lunacy—Reference—Jurisdiction of Master—Duty of Committee — Payment into Court—Lunacy Act, 9 Edw. VII. ch. 37, sec. 11 (d)—*Passing*

Accounts after Death of Lunatic—Special Reference — Practice — Payments Made out of Lunatic's Property — Gifts — Approval of Lunatic—Alleged Recovery of Sanity—Inquiry as to — Validity of Payments—Power to Supersede Declaration of Lunacy after Death—Lunacy Act, R.S.O. 1914, ch. 68, sec. 10—*Issues between Donees and Beneficiaries of Estate*.]—The property of persons not *sui juris* should not be left for private investment, but should be lodged in Court: *Re Norris and Re Drope* (1902), 5 O.L.R. 99; 9 Edw. VII. ch. 37, sec. 11 (d).—Where the Court declared a person to be a lunatic, and directed a reference to a Master to appoint a committee—who should pass his accounts annually and pay into Court balances found in his hands—and to propound and report a scheme for the maintenance of the lunatic, it was *held*, that the Master had no jurisdiction, after the death of the lunatic, to enter upon an inquiry whether the lunatic had in fact, some years before his death, become of sound mind and capable of managing his own affairs, so that certain gifts made by the committee out of the lunatic's property, with the knowledge and approval of the lunatic, might be validated.—A special reference is, upon the death of a lunatic, ordered to pass the accounts of the committee, those beneficially interested in the accounts being then represented by the person administering the estate of the lunatic, and no notice being given

to the beneficiaries. — If there was jurisdiction to make a new order directing the Master to inquire into and determine the competency of the lunatic to make the gifts, and the validity of the gifts, such an order should not be made, unless those really interested—the donees and those beneficially interested in the estate—were adequately and properly represented.—An order superseding the declaration of lunacy cannot be made after the death of the lunatic. Section 10 of the Lunacy Act, R.S.O. 1914, ch. 68, contemplates a superseding order only for the purpose of restoring the person to the management of his own affairs. *Re Rourke*, 519.

MAINTENANCE.

See INFANTS, 2—WILL, 2.

MALICIOUS PROSECUTION.

Reasonable and Probable Cause — *Advice of Counsel* — *Approval of Crown Attorney* — *Belief of Complainant in Guilt of Accused* — *Forgery* — *Similarity of Handwriting* — *Expert Opinion*.]—The judgment of MIDDLETON, J., 32 O.L.R. 178, was affirmed.—Although the facts are placed fully and fairly before experienced counsel, or even the Crown Attorney, and a prosecution is advised, this does not constitute reasonable and probable cause for a prosecution if the complainant does not himself believe in the guilt of the accused. The advice of counsel, after disclosure of all facts, is cogent evidence of the existence of reason-

able and probable cause; but, if the complainant does not believe in the guilt of the accused, there is no reasonable and probable cause for him. — *Connors v. Reid* (1911), 25 O.L.R. 44, followed.—While mere similarity of handwriting may in many cases be no reasonable cause for charging a person with forgery, the opinion of experts, that the handwriting in a proved document is not only similar to but identical with that in a controverted document, is or may be of great value, and furnish most reasonable and probable cause. — *Clements v. Ohrly* (1847), 2 C. & K. 686, considered.—In this case there were reasonable and probable grounds for the honest belief of the defendant in the guilt of the plaintiff. *McMullen v. Wellauer*, 177.

MANDAMUS.

See MUNICIPAL CORPORATIONS, 5 — CIVIL SERVICE BOARD OF HEALTH.

MARRIAGE.

See WILL, 2.

MASTER AND SERVANT.

1. *Death of Servant* — *Lineman Climbing Pole* — *Decayed Condition* — *Concealment of Negligence* — *Contributory Negligence* — *Inspection* — *Evidence* — *Findings of Jury* — *Supplemental Finding of Appellate Court*.] — A lineman employed by the defendant company came to his death in consequence of the fall of a pole which he had climbed in the course of his work, and which

was afterwards discovered to be decayed at the butt. In an action under the Fatal Accidents Act, the jury found negligence of the company's pole inspector, causing the death, and no contributory negligence: — *Held*, that it was impossible to say that the finding that C. was not guilty of contributory negligence was one that twelve reasonable men might not have made. — C. was chargeable only with disregarding a practice, not a rule, of his employer, in not seeing that the pole which he climbed was lashed to another pole before he climbed it; and the mere fact of his disregard of the practice would not have warranted the trial Judge in withdrawing the case from the jury. — *Randall v. Ahearn & Soper Limited* (1904), 34 S.C.R. 698, applied.—*Held*, also, that the findings of the jury were sufficient to entitle the plaintiff to judgment; and, if not, the Court ought to exercise the power it possessed and find the facts to supply what the jury had omitted to find, the evidence warranting such a finding. *Christie v. London Electric Co.*, 395.

2. *Death of Servant—Workman Returning from Work—Course of Employment—Orders of Foreman—Railway—Findings of Jury—Evidence.*—S. was employed by a railway company; he was paid for his work by the hour; he and other workmen were allowed to sleep in a car standing on the line of that company in the city of H.—S. had been engaged, under the charge of a foreman, in

the performance of his duties, at the town of W.; and, the work there being completed, the foreman, S. himself, and three others who had been engaged in the work, returned by train to H., arriving there about 9 p.m. The five men then began to walk along the railway track of another railway company in order to reach the sleeping-car; S. was overtaken by an engine of that railway company and killed. In an action brought under the Fatal Accidents Act, against the two railway companies, to recover damages for the death of S., the jury at the trial made findings against both defendants:—*Held*, that there was no evidence to support the findings of the jury: the injury to S. was not sustained in the course of his employment; when his work at W. was done, his work for the day had come to an end, and he was no longer subject or bound to conform to the orders or directions of the foreman; even if it was the duty of S. to take to and leave at the sleeping-car the tools he had been using at W., there was no evidence to support the conclusion that until that was done he was still subject to the orders or directions of the foreman.—*Holness v. Mackay & Davis*, [1899] 2 Q.B. 319, and *Walters v. Staveley Coal and Iron Co. Limited* (1910-11), 4 B.W. C.C. 89, 303, applied. *Sharpe v. Canadian Pacific R.W. Co.*, 402.

See FACTORY SHOP AND OFFICE BUILDING ACT — MINES AND MINERALS.

MECHANICS' LIENS.

Failure of Action to Enforce Lien—Personal Judgment against Building Owner—Mechanics and Wage Earners Lien Act, R.S.O. 1914, ch. 140, sec. 49.—In a proceeding under the Mechanics and Wage Earners Lien Act, R.S.O. 1914, ch. 140, to enforce a lien in favour of a contractor, the plaintiff, against the building owner, the defendant, it appeared that the claim of lien was registered in time, but that the action or proceeding was not commenced within the time prescribed by sec. 24; and the plaintiff, therefore, failed to enforce his lien. He was awarded judgment, however, against the defendant personally for the amount for which the lien was claimed; and this was held to be right under sec. 49—no application having been made under sec. 27, sub-sec. 5, to vacate the registration of the certificate of *lis pendens*, and the question of the validity of the lien being thus left to be tried in the manner provided by the Act. *Kendler v. Bernstock*, 351.

MINES AND MINERALS.

Statutory Obligations of Mine-owners—Mining Act of Ontario, R.S.O. 1914, ch. 32, sec. 164, rules 45, 98—Breach of—Death of Miner—Master and Servant—Negligence—Contributory Negligence—Evidence—Findings of Jury—Cause of Death—Employment of Incompetent Hoist-man—Defective System.—In an action for damages for the death of the plaintiff's husband while working in the defendants' mine, it was

held (RIDDELL, J., dissenting), that a judgment entered at the trial upon the findings of the jury—negligence and no contributory negligence—should be affirmed, the statutory obligations of the defendants as mine-owners with regard to precautions (sec. 64, rules 45 and 98, of the Mining Act of Ontario) not having been discharged; and that the defendants could not escape liability, on the ground that D., who, the jury found, was inexperienced and should not have been left alone by the defendants in the work he was doing, was a fellow-servant of the deceased. — *Choate v. Ontario Rolling Mill Co. Limited* (1900), 27 A.R. 155, *Jones v. Canadian Pacific R.W. Co.* (1913), 30 O.L.R. 331, *Grant v. Acadia Coal Co.* (1902), 32 S.C.R. 427, and *Grand Trunk R.W. Co. v. Griffith* (1911), 45 S.C.R. 380, applied. *Hull v. Seneca Superior Silver Mines Limited*, 557.

MISTAKE.

See CONTRACT, 2—WILL, 1.

MORTGAGE.

1. *Absent Mortgagee—Application by Mortgagor for Vesting Order upon Payment of Mortgage-money into Court—Trustee Act, secs. 2 (q), 8, 9—"Trustee"—Sale of Land Free from Incumbrance—Order under Conveyancing and Law of Property Act, sec. 21—Interest—Costs—Foreign Curator—Notice.*—During the continuance of a mortgage, there is no relationship of trustee and *cestui que trust* between the mortgagor and

mortgagee; and the Trustee Act, R.S.O. 1914, ch. 121, does not apply so as to enable the Court to make an order under its provisions vesting the land in the mortgagor, upon proper terms to secure the mortgage-money to the mortgagee.—Sections 2 (*q*), 8, and 9 of the Act considered.—*In re Underwood* (1857), 3 K. & J. 745, distinguished. — *In re Keeler's Mortgage* (1863), 32 L.J. Ch. 101, not followed.—*London and County Banking Co. v. Goddard*, [1897] 1 Ch. 642, 650, followed.—After the exercise of the power of sale in a mortgage, the mortgagee is a trustee of the surplus in his hands, and will be allowed to pay it into Court: *In re Kingsland* (1879), 7 P.R. 460.—An order was made under sec. 21 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, enabling the mortgagor to clear the title upon paying the mortgage-money into Court, with proper additions for interest and costs of payment out.—Position of foreign curator of absent mortgagee, considered. *Re Worthington and Armand*, 191.

2. *Executions—Distribution of Moneys Realised from Judicial Sale of Land—Priorities—Application and Effect of Creditors Relief Act, R.S.O. 1914, ch. 81.*—The Creditors Relief Act, R.S.O. 1914, ch. 81, should not be made to apply by analogy to a scheme for the equitable distribution among subsequent mortgagees and execution creditors of a fund made available for the satisfaction of creditors and mortgagees by the intervention of the Court

in a suit to have a transfer of land declared void as to creditors.—The direction of the Act, sec. 33, sub-secs. 11 and 12, should not be extended to the distribution of assets in the hands of the Court; and in this case, where there was a succession of mortgages registered at different dates, with groups of executions in the intervals between the different mortgages, priority of payment was directed according to priority of date, the executions intervening between the mortgages being grouped.—*Roach v. McLachlan* (1892), 19 A.R. 496, and *Breithaupt v. Marr* (1893), 20 A.R. 689, followed. *Union Bank of Canada v. Taylor*, 255.

See ASSIGNMENTS AND PREFERENCES, 2—LIMITATION OF ACTIONS.

MOTOR VEHICLES.

See MUNICIPAL CORPORATIONS, 1.

MOTOR VEHICLES ACT.

"Owner"—*Liability for Negligence of Trespasser*—2 Geo. V. ch. 48, sec. 19—*Amendment* by 4 Geo. V. ch. 36, sec. 3.]—The owner of an automobile placed it in a garage for repair or for some other purpose not clearly shewn, but not for demonstrating; S., the servant of the keeper of the garage, thinking the automobile was in the garage for use in demonstrating, took it out and operated it so negligently that the plaintiffs were injured, in November, 1913: — *Held*, that,

under sec. 19 of the Motor Vehicles Act, 2 Geo. V. ch. 48, which was the statute in force at the time of the injury, the owner was liable therefor.—Discussion of the meaning and effect of sec. 3 of the amending Act, 4 Geo. V. ch. 36, which came into effect on the 1st May, 1914. — *Lowry v. Thompson* (1913), 29 O.L.R. 478, *Wynne v. Dalby* (1913), 30 O.L.R. 67, and *Cillis v. Oakley* (1914), 31 O.L.R. 603, considered. *Downs v. Fisher*, 504.

MUNICIPAL CORPORATIONS.

1. *By-law of Police Commissioners for City—Motion to Quash—Jurisdiction—Power of Board to Impose License Fees on Owners and Drivers of Taxicabs—Municipal Act, R.S.O. 1914, ch. 192, sec. 422 (5).*—Apart from statute, the Court has no power to quash a municipal by-law; and, power to quash a by-law of a Board of Police Commissioners for a city not being expressly conferred by the Municipal Act, R.S.O. 1914, ch. 192, which, by sec. 422, gives power to such a Board to pass by-laws for certain purposes, the Court declined to assume jurisdiction to quash a by-law passed by such a Board.—Order of LENNOX, J., refusing to quash a by-law of the Board of Police Commissioners for the City of Ottawa, requiring persons and companies carrying on a transfer and taxicab business in the city, and their drivers, to take out licenses, and imposing fees for licenses, affirmed.—*Per* LENNOX, J.:—The by-law was au-

thorised by the provisions of sec. 422 (5) of the Act. *Re Major Hill Taxicab and Transfer Co. Limited and City of Ottawa*, 243.

2. *Contract for Supply of Crushed Stone—Manufacture by Workmen outside of Municipal Limits—"Fair Wage" Clause—Powers of Corporation—Supervisory Jurisdiction of Court.*—The Court has no jurisdiction to prevent a municipal corporation from making any contract with respect to a matter within its jurisdiction—no right to interfere with municipal action unless the corporation proposes to transcend the limits of the jurisdiction conferred upon it by the Legislature.—The purchase of stone for municipal purposes being *intra vires* of a municipal corporation, there is nothing *ultra vires* in introducing into a contract for the purchase of crushed limestone a clause providing that the contractor shall pay the workmen employed by him in the execution of the contract the union rate of wages prevailing at the date of the contract.—An action by a ratepayer and a company to restrain a city corporation from entering into a contract with any person other than the plaintiff company (who had tendered without the "fair wage" clause) for the purchase of crushed limestone, to be manufactured by labourers outside the city limits, and to restrain the corporation from inserting in any contract a "fair wage" clause, was dismissed.—*Crown Tailoring Co. v. City of Toronto* (1903), 33 O.L.R. 92 (note), not followed.—*Kelly*

v. *City of Winnipeg* (1898), 12 Man. R. 87, explained and approved. *Rogers v. City of Toronto*, 89.

3. *Inquiry into Affairs of Corporation—Rights of Residents—Newspaper Reporters—Statutory Rights—Municipal Act, R.S.O. 1914, ch. 192, secs. 219, 237—Declaratory Judgment.*—Municipalities in Ontario are not an evolution from the common law municipal corporations, but are the product of statutory enactments. An inhabitant or person, in regard to the affairs of a municipality, has no right of examination or inquiry except such as is expressly or by implication given by statute.—*Tenby Corporation v. Mason*, [1908] 1 Ch. 457, applied and followed.—*Williams v. Mayor, etc., of Manchester* (1897), 13 Times L.R. 299, distinguished.—A declaratory judgment defining the rights of newspaper reporters to obtain access to municipal offices and information from municipal officers was affirmed. *Journal Printing Co. v. McVeity*, 166.

4. *Regulation of Buildings on Residential Streets of City—Municipal Act, R.S.O. 1914, ch. 192, sec. 406 (10)—Municipal By-law—Prescribed Distance from Line of Street—Steps Projecting from Front Wall of Building beyond Defined Line.*—A by-law of a city corporation, authorised by sec. 406, sub-sec. 10, of the Municipal Act, R.S.O. 1914, ch. 192, prohibited the placing of a building on a residential street nearer to the street line than a

certain prescribed distance:—*Held*, that, where the building was well within the prescribed line, the erection of steps in front of it, and as a means of access to the front door, extending some distance from the front wall of the building and across the prescribed line—the steps not being more than four feet six inches above the ground level—was not within the prohibition of the statute and by-law.—Review of the authorities.—*Paddington Corporation v. Attorney-General*, [1906] A.C. 1, specially referred to. *Re Masonic Temple Co. and City of Toronto*, 497.

5. *Resolution of Council Requesting Inquiry by County Court Judge—Charges against Police Force—Authority of Police Commissioners—Municipal Act, R.S.O. 1914, ch. 192, sec. 248—Construction and Scope—Jurisdiction of Judge—Refusal of Mandamus.*—The inquiry authorised by sec. 248 of the Municipal Act, R.S.O. 1914, ch. 192, is limited to matters within the jurisdiction of the municipal council, and is to be made with a view to obtaining a report for the guidance of the council in dealing with matters over which it has authority.—And it was *held*, refusing a motion for a mandamus, that a County Court Judge rightly declined to proceed with an inquiry, under a resolution of a city council, into certain charges of misconduct and lack of harmony in the police force of the city.—*Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co. Lim-*

ited (1913), 17 Commonwealth L.R. 644, [1914] A.C. 237, *Godson v. City of Toronto* (1890), 18 S.C.R. 36, *Kelly v. Barton* (1895), 26 O.R. 608, 22 A.R. 522, and *Winterbottom v. London Police Commissioners* (1901), 1 O.L.R. 549, 2 O.L.R. 105, followed.—*Lane v. City of Toronto* (1904), 7 O.L.R. 423, distinguished. *Re City of Berlin and the County Judge of the County of Waterloo*, 73.

6. *Smoke Prevention By-law of Urban Municipality*—Municipal Act, R.S.O. 1914, ch. 192, sec. 400, sub-sec. 45—*Application to Railway Locomotive Engine*—“*Flue, Stack or Chimney*”—Dominion Railway Company—Municipal Law—Dominion Board of Railway Commissioners.]—Section 400, sub-sec. 45, of the Municipal Act, R.S.O. 1914, ch. 192, authorising the councils of urban municipalities to pass by-laws requiring every person who operates or uses any furnace or fire, “to prevent the emission to the atmosphere from such fire of opaque or dense smoke for a period of more than six minutes in any one hour, or at any other point than the opening to the atmosphere of the flue, stack or chimney,” does not apply to a locomotive engine: the top of the smoke-stack of the engine, from which is the opening to the atmosphere, is not a “flue, stack or chimney,” within the meaning of the section.—Order of MIDDLETON, J., in *Chambers*, quashing a conviction of the defendant, a Dominion railway company, for an offence against a city by-

law passed pursuant to the enactment mentioned, affirmed.—*Per* MIDDLETON, J.:—The railway company, in its operation, is not subject to the municipal by-law, but is subject to the regulations of the Dominion Board of Railway Commissioners. *Rex v. Canadian Pacific R.W. Co.*, 248.

See CONTRACT, 2—HIGHWAY—NEGLIGENCE—PROVINCIAL BOARD OF HEALTH.

MUNICIPAL ELECTIONS.

1. *Eligibility of Candidate*—*Liability for Arrears of Taxes “at the Time of the Election”*—*Liability Existing on Nomination Day*—Municipal Act, R.S.O. 1914, ch. 192, sec. 53 (1) (s)—*Corrupt Practices*—*Threat*—*Evidence*—*Disqualification*—Secs. 180, 189—*Illegal Acts of Agents*—*Knowledge*.]—“*Election*” in the Municipal Act, R.S.O. 1914, ch. 192, sec. 53 (1), includes nomination; and the respondent, in a proceeding in the nature of a *quo warranto* under the Act to void his election as mayor of a town, being liable for arrears of taxes at the time of the nomination, though not on the day of polling, was held not to have been eligible as a candidate.—The power of disqualification exercisable by a Judge under the Act, where (sec. 189) a person, or (sec. 180) a candidate, is found guilty of a corrupt practice, is one which should be exercised only in a plain case, upon clearly proved facts.—And held, that words used by the respondent, in the light of all the facts set out in the evidence, were not such as could

properly be determined to be a threat under sec. 189.—*Held*, also, that illegal acts alleged to have been committed by agents of the respondent were not shewn to have come to his knowledge. *Rex ex rel. Mitchell v. McKenzie*, 196.

2. *Proceedings to Unseat Persons Declared Elected—Municipal Act, R.S.O. 1914, ch. 192, secs. 161, 162, 163—Fiats Granted by County Court Judge—Interest of Relator not Made to Appear—Jurisdiction of Judge to Set aside Fiats—Rule 217—Orders Refusing to Set aside Fiats—Right of Appeal from, to Appellate Division—Persona Designata—Judges' Orders Enforcement Act, R.S.O. 1914, ch. 79, sec. 4.*—Fiats under sec. 162 of the Municipal Act, R.S.O. 1914, ch. 192, allowing the relator to serve notices of motion for orders declaring that the defendants were not duly elected to municipal offices at municipal elections, though so declared, were granted by a County Court Judge. The defendants moved before the same Judge to set aside the fiats. The Judge held that he had no power to do so, and dismissed the motions, but gave the defendants leave to appeal; and they appealed to a Divisional Court of the Appellate Division:—*Held*, by FALCONBRIDGE, C.J.K.B., and RIDDELL, J., that the Judge was *persona designata*, and the appeal lay, upon his leave, by virtue of sec. 4 of the Judges' Orders Enforcement Act, R.S.O. 1914, ch. 79.—*Per* LATCHFORD and KELLY, JJ., that this statute

had no application to an appeal from the decision of a Judge under the authority conferred by Part IV. of the Municipal Act; and there was no right of appeal, with or without leave.—The Court being divided, the appeal was dismissed.—It was *held*, also, by FALCONBRIDGE, C.J.K.B., and RIDDELL, J., that the County Court Judge had power to make orders setting aside the fiats which he had granted (Rule 217); and that he should have made the orders: the fiats were improperly granted because the interest of the relator as an elector who had voted or tendered his vote at the election was not made in any way to appear upon the material brought before the Judge: secs. 161 (2) (as amended by 4 Geo. V. ch. 33, sec. 5), 162 (1), and 163 of the Municipal Act.—Review of the authorities. *Rex ex rel. Boyce v. Porter, Rex ex rel. Boyce v. Ellis and Nelson*, 575.

NAMES.

See TRADE MARK.

NATURALISATION.

See ALIEN ENEMY.

NEGLIGENCE.

Death Caused by Electric Shock—Liability of Telephone Company—Evidence of Negligence—Finding of Trial Judge—Reversal on Appeal—Dismissal of Action as against one of two Defendants—Costs.—It is not enough for the plaintiff to shew that he has sustained an injury under circum-

stances which may lead to a suspicion, or even a fair inference, that there may have been negligence on the part of the defendant; the plaintiff must give evidence of some specific act of negligence on the part of the person against whom he seeks compensation.—*Lovegrove v. London Brighton and South Coast R. W. Co.* (1864), 16 C.B.N.S. 669, 692, applied.—And *held*, upon the evidence, reversing the judgment of MIDDLETON, J., 31 O.L.R. 405, that the plaintiffs' case against the defendant the Bell Telephone Company of Canada failed; and the company's appeal against the judgment was allowed with costs and the action as against the company dismissed with costs. *Till v. Town of Oakville*, 120. (See COSTS, 2.)

See HIGHWAY, 2—MASTER AND SERVANT, 1—MINES AND MINERALS—MOTOR VEHICLES ACT—PRINCIPAL AND AGENT, 1—RAILWAY, 1, 2.

NEGOTIABLE INSTRUMENTS.

See BILLS AND NOTES.

NEW TRIAL.

See INSURANCE, 4.

NEWSPAPER.

See MUNICIPAL CORPORATIONS, 3.

NONREPAIR OF HIGHWAY.

See HIGHWAY, 2.

NOTICE.

See ASSIGNMENTS AND PREFERENCES, 2—DEED—MORTGAGE, 1.

NOVATION.

See COMPANY, 6.

ORIGINATING NOTICE.

See INFANTS, 2.

PARTIES.

See CANADA TEMPERANCE ACT—COSTS, 2, 3.

PARTITION.

See WILL, 1.

PASSING-OFF.

See TRADE MARK.

PAYMENT INTO COURT.

See LUNATIC—MORTGAGE, 1.

PERPETUITIES.

See WILL, 1.

PERSONA DESIGNATA.

See MUNICIPAL ELECTIONS, 2.

PLAN.

See HIGHWAY, 1.

PLEADING.

Action upon Life Insurance Policy—Clause of Policy not specially Pleaded — Amendment—Waiver.—In an action to recover the amount secured by a policy of life insurance, determined not to be in force at the death of the insured, it was *held* (by RIDDELL, J., in a Divisional Court) that the defendants, the insurers, were entitled to rely upon a

certain clause of the policy without pleading it specially. But, if it were necessary to plead it, the defendants should be allowed to amend; for they had specially pleaded the facts relied upon; the plaintiff was not taken by surprise; and the defendants had not waived any defence based upon the clause referred to.—*Lake Erie and Detroit River R.W. Co. v. Sales* (1896), 26 S.C.R. 663, 677, referred to. *Devitt v. Mutual Life Insurance Co. of Canada*, 473.

POLICE COMMISSIONERS.

See MUNICIPAL CORPORATIONS, 1, 5.

POSSESSORY TITLE.

See LIMITATION OF ACTIONS—WILL, 1.

PRACTICE.

See APPEAL — ASSIGNMENTS AND PREFERENCES, 1—COSTS—DISCOVERY — DIVISION COURTS — EVIDENCE — EXECUTION — INFANTS, 2—JUDGMENT—LUNATIC — PLEADING — PRINCIPAL AND AGENT, 3—SOLICITOR.

PREFERENTIAL LIEN.

See COMPANY, 4.

PRESUMPTION.

See EXECUTION 2 — INSURANCE, 4.

PRINCIPAL AND AGENT.

1. *Customs Broker—Breach of Duty — Depriving Principal of*

Control over Goods—Negligently Entrusting Sub-agent with Bill of Lading Endorsed in Blank—Misdelivery of Goods—Negligence of Sub-agent and of Carriers—Third Parties—Liability over—Damages—Costs.]—In an action by the vendor of goods against his Customs brokers, it was *held*, that the latter were guilty of a gross breach of their contract in sending forward the bill of lading endorsed in blank, and were guilty of negligence, whereby, and by reason of the negligence of a sub-agent and the carriers, the vendee obtained possession without paying the price; the sub-agent was held liable over to the brokers; and the carriers were *held* liable for the misdelivery of the goods. Certain other findings of fact and law were made by the trial Judge (MEREDITH, C.J.C. P.), and his judgment was affirmed by a Divisional Court of the Appellate Division. The question of costs was considered. *Wolsely Tool and Motor Car Co. v. Jackson Potts & Co.*, 96, 587.

2. *Insurance Agent—Fire Insurance Contracts Obtained for Principal—Payment of Amount of Premiums to Agent—Course of Dealing between Agent and Insurance Companies—Acceptance of Agent as Debtor—Res inter alios—Validity of Policies—Notices of Cancellation—Duty of Agent.*]—The defendant, an insurance agent and broker, was employed by the plaintiff company to effect insurances against fire. He obtained (through one R.) and delivered to the plaintiff company five policies, one issued by each of

five insurance companies, and was paid by the plaintiff company the amount of the premiums in respect of the five policies:—*Held*, upon the evidence, that each of the insuring companies looked to its agent as its debtor for the amount of these premiums, and not to the plaintiff company; thus the premiums had been paid to four of the companies; the payment was absolute; and the plaintiff company was discharged from liability to pay, the transactions between R. and the insuring companies not being *res inter alios*.—*London and Lancashire Life Assurance Co. v. Fleming*, [1897] A.C. 499, explained and distinguished. — The defendant was *held*, not liable to the plaintiff company for breach of duty in respect of the insurance with the four companies; but otherwise as to the fifth company, who had the right to repudiate and did repudiate liability. *Antiseptic-Bedding Co. v. Gurofski*, 319.

3. *Undisclosed Principal—Action against both—Judgment Recovered against Agent upon Default—Bar to Prosecution of Action against Principal—Judgment not to be Set aside except on Consent of Principal.*—Where the case presented by the statement of claim in a County Court action was that the defendants L. and C. were undisclosed principals of the defendant T., it was *held*, that a judgment against the defendant T., the alleged agent—though a judgment upon default—was a bar to the prosecution of the action against the principals;

and, the cause of action having passed into a judgment, this judgment could not be set aside without the consent of the principals.—*Morel Brothers & Co. Limited v. Earl of Westmorland*, [1903] 1 K.B. 64, [1904] A.C. 11, 14, *McLeod v. Power*, [1898] 2 Ch. 295, and other cases, referred to.—Discussion and explanation of the different classes of cases in which actions are brought against principals and agents.—*Partington v. Hawthorne* (1888), 52 J.P. 807, explained. *M. Brennen & Sons Manufacturing Co. Limited v. Thompson*, 465.

See INSURANCE, 1.

PRINCIPAL AND SURETY.

See ASSIGNMENTS AND PREFERENCES, 1.

PROMISSORY NOTE.

See BILLS AND NOTES, 2—INSURANCE, 3.

PROOFS OF DEATH.

See INSURANCE.

PROSPECTUS.

See CRIMINAL LAW.

PROVINCIAL BOARD OF HEALTH.

Approval of Plans and Specifications for System of Municipal Water Supply—Statutory Duty of Board—Disapproval of Source of Supply — Ultra Vires — Public Health Act, 2 Geo. V. ch. 58—Jurisdiction of Court—Mandamus.—In regard to schemes devised to secure an improved

water supply for the City of Ottawa, two special Acts were passed by the Ontario Legislature, 4 Geo. V. chs. 82 and 84. The Provincial Board of Health refused to approve of the plans and specifications for carrying out one of the schemes, approved by the ratepayers, because it did not approve of the scheme; and it was *held*, that the Board had exceeded its powers; and that a mandamus should be granted.—The Board, acting under the Public Health Act, 2 Geo. V. ch. 58, and under 4 Geo. V. ch. 48, is not a mere emanation from the Crown, but a public authority performing a statutory duty.—*Rex v. Board of Education*, [1910] 2 K.B. 165, 178, and *Rex v. Lords Commissioners of His Majesty's Treasury*, [1909] 2 K.B. 183, followed.—*Graham v. Commissioners for Queen Victoria Niagara Falls Park* (1896), 28 O.R. 1, distinguished. *Re City of Ottawa and Provincial Board of Health*, 1.

PROVINCIAL LEGISLATURE.

See CONSTITUTIONAL LAW.

PROVINCIAL SECRETARY.

See COMPANY, 1.

PUBLIC HEALTH ACT.

See PROVINCIAL BOARD OF HEALTH.

RAILWAY.

1. *Injury to Person Crossing Tracks of Electric Railway on Company's Land—Private Driveway across Tracks—Dangerous*

Crossing—Duty to Give Warning of Approach of Car—Negligence—Evidence—Findings of Jury.]—The defendant company owned and operated an electric railway upon a strip of land adjoining a highway. There was a planked way across the strip which afforded access to a house and grounds. In attempting to cross the defendant's tracks at this point, the plaintiff was struck by a car and injured, as the jury found, by reason of the negligence of the defendant, *i.e.*, excessive speed and no warning, negating contributory negligence:—*Held*, that the findings were warranted by the evidence, and the plaintiff was entitled to recover.—*Grand Trunk R.W. Co. v. McKay* (1903), 34 S.C.R. 81, and *Bell v. Grand Trunk R.W. Co.* (1913), 48 S.C.R. 561, distinguished.—*Semble*, that, if the crossing had been a highway crossing, the *McKay* case would have applied. According to that case, it is not competent for a jury to add to the safeguards prescribed by the Railway Act. *Gowland v. Hamilton Grimsby and Beamsville Electric R.W. Co.*, 372.

2. *Level Highway Crossing—Person Killed by Engine—Negligence—Failure to Give Warning—Gates Erected without Authority or Direction of Board of Railway Commissioners—Person Going upon Portion of Highway between Gates when down—Exclusive Right of User—Railway Act, R.S.C. 1906, ch. 37, sec. 279—Contributory Negligence—Question for Jury.*]—Where in the case of a

Dominion railway it is not shewn that the erection of gates at a level highway crossing is authorised or required by an order or direction of the Board of Railway Commissioners for Canada, the lowering of the gates is but a warning to persons desiring to cross the tracks that it is dangerous to do so. The railway company has not, by virtue of sec. 279 of the Railway Act, R.S.C. 1906, ch. 37, or otherwise, the exclusive right of user of that part of the highway within the gates, when the gates are down.—Meaning and effect of sec. 279 explained.—*Wyatt v. Great Western R.W. Co.* (1865), 34 L.J.Q.B. 204, distinguished.—The entry of a person upon the portion of the highway between the gates, when the gates are down, is not, as a matter of law or *per se*, negligence disentitling him to recover damages for injuries sustained by him while upon that portion of the highway, by reason of the negligence and breach of statutory duty of the railway company: it is a question for the jury to decide whether, in all the circumstances, he was guilty of contributory negligence. — Review of the American authorities. *Garside v. Grand Trunk R.W. Co.*, 388.

See MASTER AND SERVANT, 2—
MUNICIPAL CORPORATIONS, 6.

RATIFICATION.

See COMPANY, 2.

REASONABLE AND PROBABLE CAUSE.

See MALICIOUS PROSECUTION.

REFERENCE.

See LUNATIC.

REGISTRY LAWS.

See ASSIGNMENTS AND PREFERENCES, 2—COMPANY, 1.

RELATOR.

See MUNICIPAL ELECTIONS, 2.

RESCISSION.

See VENDOR AND PURCHASER.

RESOLUTION.

See MUNICIPAL CORPORATIONS, 5.

RETURNING OFFICER.

See CANADA TEMPERANCE ACT.

ROAD.

See HIGHWAY.

RULES.

(Consolidated Rules of the Supreme Court of Ontario, 1913.)

Rule 56.]—See JUDGMENT, 2, 3.

Rule 57.]—See APPEAL, 2—
JUDGMENT, 2, 3.

Rule 334.]—See DISCOVERY.

Rule 571.]—See EXECUTION, 2.

Rule 600.]—See ASSIGNMENTS
AND PREFERENCES, 1.

SALE OF GOODS.

Animal—Warranty—Sale for Particular Purpose—Knowledge of Vendor—Express Warranty—Defect—Breach—Damages—Recovery of Purchase-price and Expenses less Actual Value of Animal—Return of Animal—Election of Vendor.]—In an action for damages for the breach of an alleged warranty on the

sale of a stallion, it was *held*, that the horse had a defect which existed from his birth, and which rendered him unfit for breeding purposes; that the defendant knew that the plaintiff was buying the horse for breeding purposes; and that there was an express as well as an implied warranty that he was fit for breeding purposes.—*Held*, as to damages, that the plaintiff was entitled to recover the price paid for the horse, the expense of transporting him to the plaintiff's abode, and interest on the purchase-price; and, having offered to return the horse, the plaintiff was also entitled to recover all expenses necessarily caused by the horse lying on his hands until the horse could be sold, this being limited to a reasonable time; and from these sums should be deducted the actual value of the horse. The defendant, however, should be at liberty, at his election, to pay the plaintiff for the horse's keep and to take back the horse. *Wood v. Anderson*, 143.

SALE OF LAND.

See EXECUTION, 1 — MORTGAGE, 1, 2—VENDOR AND PURCHASER.

SALE OF INTOXICATING LIQUORS.

See LIQUOR LICENSE ACT.

SATISFACTION.

See EXECUTION, 1.

SCRUTINY.

See CANADA TEMPERANCE ACT.

SEPARATION AGREEMENT.

See INFANTS, 1.

SETTLEMENT OF ACTION.

See SOLICITOR.

SHARES AND SHARE-HOLDERS.

See COMPANY, 1, 2, 3—EXECUTORS AND ADMINISTRATORS.

SMOKE PREVENTION.

See MUNICIPAL CORPORATIONS, 6.

SOLICITOR.

Pauper Client — Plaintiff in Contested Action—Settlement between Parties without Knowledge of Solicitor — Collusion — Evidence — Onus — Order for Payment of Whole of Solicitor's Costs.] —Where, after judgment had been recovered in this action by the plaintiff, a pauper, against the defendants for \$1,500, and, after two appeals, the action had been entered again for trial, the Supreme Court of Canada having ordered a new trial, the defendants settled with the plaintiff for \$400, which sum they paid him, whereupon he left Canada—the settlement, payment, and departure being without the knowledge of the plaintiff's solicitors, whose claim upon the plaintiff for their costs incurred in prosecuting the action and in respect of the appeals had not been paid or provided for—it was *held*, that the settlement was fraudulent and collusive; and the defendants were ordered to pay the whole of the plaintiff's solicitors' costs. In such a case the liability is not

limited to the amount paid to the opposite party; and the onus is upon the solicitors to prove collusion.—Discussion of the meaning of “collusion” and review of the authorities. *Dicarllo v. McLean*, 231.

STATUTE OF DISTRIBUTIONS.

See EXECUTORS AND ADMINISTRATORS.

STATUTE OF LIMITATIONS.

See EXECUTION, 2—LIMITATION OF ACTIONS—WILL, 1.

STATUTES.

- 30 & 31 Vict. ch. 3, sec. 92 (2) (Imp.) (British North America Act).
See CONSTITUTIONAL LAW.
- R.S.O. 1877, ch. 167, sec. 4 (Act respecting Benevolent, Provident, and other Societies).
See INSURANCE, 2.
- 45 Vict. ch. 19, sec. 2 (O.) (Act respecting Companies for Supplying Electricity for the purposes of Light, Heat, and Power).
See CONTRACT, 2.
- R.S.O. 1887, ch. 175, secs. 2, 3, 12, 17, 32, 33 (Act respecting Cemetery Companies).
See COMPANY, 1.
- R.S.O. 1897, ch. 133, sec. 23 (Limitations Act).
See EXECUTION, 2.
- R.S.O. 1897, ch. 285, secs. 3, 8 (Ditches and Watercourses Act).
See DITCHES AND WATERCOURSES.
- 60 Vict. ch. 27, sec. 20 (O.) (Amending Surveys Act).
See HIGHWAY, 1.
- 62 Vict. ch. 31, sec. 4 (O.) (Act respecting Brewers' and Distillers' and other Licenses).
See LIQUOR LICENSE ACT.
- 3 Edw. VII. ch. 15 (sec.8) (Amending Insurance Act).
See INSURANCE, 2.
- 3 Edw. VII. ch. 19, secs. 601, 607, 629 (1), 637 (1), 640 (11) (O.) (Municipal Act).
See HIGHWAY, 1.
- 5 Edw. VII. ch. 13, sec. 10 (O.) (Amending Limitations Act).
See EXECUTION, 2.
- R.S.C. 1906, ch. 37, sec. 279 (Railway Act).
See RAILWAY, 2.
- R.S.C. 1906, ch. 119, secs. 38, 39, 54, 55, 56, 74 (Bills of Exchange Act).
See BILLS AND NOTES, 1.
- R.S.C. 1906, ch. 144 (Winding-up Act).
See COMPANY, 5.
- R.S.C. 1906, ch. 144, secs. 5, 23, 133.
See COMPANY, 4.
- R.S.C. 1906, ch. 146, secs. 405 A., 414 (Criminal Code).
See CRIMINAL LAW.
- R.S.C. 1906, ch. 152, secs. 69, 105 (Canada Temperance Act).
See CANADA TEMPERANCE ACT.
- 7 Edw. VII. ch. 34, secs. 80, 81, 87, 89 (O.) (Companies Act).
See COMPANY, 2.
- 9 Edw. VII. ch. 37, sec. 11 (d) (O.) (Lunacy Act).
See LUNATIC.
- 9 Edw. VII. ch. 82, sec. 47 (O.) (Amending Act respecting Brewers' and Distillers' and other Licenses).
See LIQUOR LICENSE ACT.
- 10 Edw. VII. ch. 34, secs. 24 (2), 49 (O.) (Limitations Act).
See EXECUTION, 2.
- 1 Geo. V. ch. 42, sec. 44 (O.) (Surveys Act).
See HIGHWAY, 1.
- 1 Geo. V. ch. 64, sec. 16 (O.) (Amending Act respecting Brewers' and Distillers' and other Licenses).
See LIQUOR LICENSE ACT.
- 2 Geo. V. ch. 31, secs. 11, 13 (O.) (Companies Act).
See COMPANY, 1.
- 2 Geo. V. ch. 48, sec. 19 (O.) (Motor Vehicles Act).
See MOTOR VEHICLES ACT.
- 2 Geo. V. ch. 58 (O.) (Public Health Act).
See PROVINCIAL BOARD OF HEALTH.
- 3 & 4 Geo. V. ch. 60 (O.) (Factory Shop and Office Building Act).
See FACTORY SHOP AND OFFICE BUILDING ACT.
- R.S.O. 1914, ch. 1, sec. 27 (Interpretation Act).
See COMPANY, 2.
- R.S.O. 1914, ch. 27, sec. 4 (3) (Corporations Tax Act).
See CONSTITUTIONAL LAW.
- R.S.O. 1914, ch. 32, sec. 164, rules 45, 98 (Mining Act).
See MINES AND MINERALS.

R.S.O. 1914, ch. 40, sec. 19 (Highway Improvement Act).
See HIGHWAY, 2.
 R.S.O. 1914, ch. 59, sec. 40 (2) (County Courts Act).
See APPEAL, 1.
 R.S.O. 1914, ch. 59, sec. 44.
See APPEAL, 2.
 R.S.O. 1914, ch. 63, secs. 62 (*d*), 106, 125 (*a*) (Division Courts Act).
See DIVISION COURTS.
 R.S.O. 1914, ch. 68, sec. 10 (Lunacy Act).
See LUNATIC.
 R.S.O. 1914, ch. 75, secs. 5, 7 (3), 12, 40, 41 (Limitations Act).
See WILL, 1.
 R.S.O. 1914, ch. 75, sec. 6, sub-secs. 6, 7, sec. 23 (Limitations Act).
See LIMITATION OF ACTIONS.
 R.S.O. 1914, ch. 79, sec. 4 (Judges' Orders Enforcement Act).
See MUNICIPAL ELECTIONS, 2.
 R.S.O. 1914, ch. 81, sec. 33 (11), (12) (Creditors Relief Act).
See MORTGAGE, 2.
 R.S.O. 1914, ch. 109, sec. 21 (Conveyancing and Law of Property Act).
See MORTGAGE, 1.
 R.S.O. 1914, ch. 109, sec. 37.
See WILL, 1.
 R.S.O. 1914, ch. 121, secs. 2 (*q*), 8, 9, (Trustee Act).
See MORTGAGE, 1.
 R.S.O. 1914, ch. 121, sec. 66
See ASSIGNMENTS AND PREFERENCES, 1.
 R.S.O. 1914, ch. 134 (Assignments and Preferences Act).
See ASSIGNMENTS AND PREFERENCES, 1.
 R.S.O. 1914, ch. 140, secs. 24, 27 (5), 49 (Mechanics and Wage Earners Lien Act).
See MECHANICS' LIENS.
 R.S.O. 1914, ch. 153, sec. 31 (2) (Infants Act).
See INFANTS, 2.
 R.S.O. 1914, ch. 155, sec. 38 (Landlord and Tenant Act).
See COMPANY, 4.
 R.S.O. 1914, ch. 178, secs. 23, 93 (Companies Act).
See COMPANY, 2.
 R.S.O. 1914, ch. 178, sec. 98.
See COMPANY, 6.
 R.S.O. 1914, ch. 192, secs. 53 (1) (*s*), 180, 189 (Municipal Act).
See MUNICIPAL ELECTIONS, 1.
 R.S.O. 1914, ch. 192, secs. 161, 162, 163.
See MUNICIPAL ELECTIONS, 2.
 R.S.O. 1914, ch. 192, secs. 219, 237.
See MUNICIPAL CORPORATIONS, 3.

R.S.O. 1914, ch. 192, sec. 248.
See MUNICIPAL CORPORATIONS, 5.
 R.S.O. 1914, ch. 192, sec. 400 (45).
See MUNICIPAL CORPORATIONS, 6.
 R.S.O. 1914, ch. 192, sec. 406 (10).
See MUNICIPAL CORPORATIONS, 4.
 R.S.O. 1914, ch. 192, sec. 422 (5).
See MUNICIPAL CORPORATIONS, 1.
 R.S.O. 1914, ch. 215, sec. 155 (Liquor License Act).
See LIQUOR LICENSE ACT.
 4 Geo. V. ch. 11, sec. 2 (O.) (Amending Corporations Tax Act).
See CONSTITUTIONAL LAW.
 4 Geo. V. ch. 33, sec. 5 (O.) (Amending Municipal Act).
See MUNICIPAL ELECTIONS, 2.
 4 Geo. V. ch. 36, sec. 3 (O.) (Amending Motor Vehicles Act).
See MOTOR VEHICLES ACT.
 4 Geo. V. chs. 82, 84 (O.) (Ottawa Water Supply).
See PROVINCIAL BOARD OF HEALTH.
 5 Geo. V. ch. 2, sec. 11 (D.) (War Measures Act, 1914).
See ALIEN ENEMY.

STREET.

See HIGHWAY.

STREET RAILWAY.

See RAILWAY, 1.

SUMMARY APPLICATION.

See ASSIGNMENTS AND PREFERENCES, 1—INFANTS, 2.

SUMMARY JUDGMENT.

See JUDGMENT, 2, 3.

SURRENDER VALUE.

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SURVEYS ACT.

See HIGHWAY, 1.

TAXES.

See CONSTITUTIONAL LAW—LIMITATION OF ACTIONS—MUNICIPAL ELECTIONS, 1.

TELEPHONE COMPANY.

See NEGLIGENCE.

TENANCY AT WILL.

See LIMITATION OF ACTIONS.

TENANTS IN COMMON.

See WILL, 1.

THIRD PARTIES.

See COSTS, 3 — PRINCIPAL AND AGENT, 1.

THREATS.

See MUNICIPAL ELECTIONS, 1.

TIME.

See APPEAL, 1.

TITLE TO LAND.

See ASSIGNMENTS AND PREFERENCES, 2—LIMITATION OF ACTIONS—VENDOR AND PURCHASER—WILL, 1.

TRADE AGREEMENT.

See CONTRACT, 4.

TRADE MARK.

Infringement — Invented Word — Initials of Company's Name — Use of Similar Word by another Company in Rival Business — Validity of Registration — Right to Impeach — Confusion from Similarity of Names — Passing-off — Evidence.—The plaintiff company used and registered as a trade mark the manufactured word "Sebco" (made up of the initials of the name of a company of which the plaintiff company was an offshoot), and sought to restrain the defendant company from using the similarly manufactured word "Cebcol" in connection with the sale of its goods

(expansion bolts), also dealt in by the plaintiff company. The action was based upon the allegations (1) that the defendant company's mark "Cebcol" (registered as a trade mark pending the action) was a fraudulent imitation of the plaintiff company's mark, and (2) that the defendant company was selling and passing off its goods in a deceptive manner so as to induce purchasers to believe that they were the goods of the plaintiff company. It was considered that, upon the facts and law, both of these claims failed, and the action was dismissed. The following cases were considered and applied: *In re R. J. Lea Limited's Application*, [1913] 1 Ch. 446; *Registrar of Trade Marks v. W. & G. Du Cros Limited*, [1913] A.C. 624; *Payton & Co. v. Snelling Lampard & Co.*, [1901] A.C. 308; *Claudius Ash Sons & Co. Ltd. v. Invicta Manufacturing Co. Limited* (1912), 29 R.P.C. 465; *Johnson v. Parr* (1873), Russell Eq. Dec. (N.S.) 98; *Rutter & Co. v. Smith* (1900), 18 R.P.C. 49; *Provident Chemical Works v. Canada Chemical Manufacturing Co.* (1902), 4 O.L.R. 545; *Spilling v. O'Kelly* (1904), 8 Can. Ex. C.R. 426. *J. Edward Ogden Co. Limited v. Canadian Expansion Bolt Co. Limited*, 589.

TRESPASS.

See MOTOR VEHICLES ACT.

TRUSTS AND TRUSTEES.

See ASSIGNMENTS AND PREFERENCES — COMPANY, 1, 2 —

EXECUTORS AND ADMINISTRATORS—MORTGAGE, 1.

VENDOR AND PURCHASER.

Agreement for Sale of Land—Rescission — Purchaser's Damages—Costs of Investigating Title — Loss of Bargain — Vendor's Damages—Removal of Buildings by Purchaser—Inability to Make Restitutio in Integrum — Provisions of Contract — Consent to Alteration of Property—Measure of Damages—Profit from Buildings.]—In this case, previously reported in 31 O.L.R. 365, it was held, by MIDDLETON, J., on appeal from the Master's report, and affirmed by a Divisional Court, that, as the defendant's title was at all times good (see *Pigott v. Bell* (1913), 5 O.W.N. 314), and as it was not suggested that there was any collusion or deliberate failure on his part, the plaintiffs were not entitled to recover from him damages beyond the costs of investigating the title to the land. — Upon the question of the defendant's damages recoverable against the plaintiffs, it was held by the Divisional Court, reversing the judgment of MIDDLETON, J., that the former judgment of the Divisional Court (31 O.L.R. 365) did not involve *restitutio in integrum* or its equivalent. Inability to make such restitution is a bar only as against the party by whose acts the property has been changed or depreciated. The buildings upon the land which was the subject of the contract of sale were removed by the plaintiffs, the purchasers, in pur-

suance of the terms of the contract, in good faith, and before notice of the fact that trouble was likely to arise from the prior agreement affecting the land; and the alteration was, therefore, something consented to by both parties. The proper measure of the defendant's damages was, therefore, the amount received by the plaintiffs from the sale and salvage of the buildings over and above the cost of removal — not the value of the buildings. *McNiven v. Pigott*, 78, 335.

WAGES.

See COMPANY, 6.

WAIVER.

See INSURANCE, 4—PLEADING.

WAR MEASURES ACT, 1914.

See ALIEN ENEMY.

WARRANTY.

See SALE OF GOODS.

WATERWORKS.

See PROVINCIAL BOARD OF HEALTH.

WILL.

1. *Construction—Devises—Habendum—Tenants in Common—Estates for Life and in Remainder—Intestacy after Life Estates—Rule against Perpetuities—Double Possibilities—Title by Possession—Limitations Act, R.S.O. 1914, ch. 75, secs. 5, 7 (3), 12, 40, 41—Rights of Heirs at Law—Division of Land by Life-tenants in Common—Estoppel—Partition—Reference—Questions of Title—Improvements under Mistake of*

Title—Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 37.]—This action was brought to obtain a declaration of the rights of the parties in respect of 50 arpents of the land devised by the will set forth in *Re Sharon and Stuart* (1906), 12 O.L.R. 605; for partition, possession, etc. The will was construed, and the case mentioned, which dealt with another devise in the same will, explained and distinguished. Upon the construction of the devise in question, *Whitby v. Mitchell* (1889-90), 42 Ch.D. 494, 44 Ch.D. 85, *Chandler v. Gibson* (1901), 2 O.L.R. 242, and *Grant v. Fuller* (1902), 33 S.C.R. 34, were considered.—It was *held*, also, that sec. 7 (3) of the Limitations Act, R.S.O. 1914, ch. 75, applied; and *Doe dem. Hall v. Moulds* (1847), 16 M. & W. 689, was followed; and *Sladden v. Smith* (1858), 7 U.C.C.P. 74, overruled.—The effect of secs. 5, 12, 40, and 41 of the Act, was also considered; *In re Hobbs* (1887), 36 Ch.D. 553, followed; and *Hill v. Ashbridge* (1892), 20 A.R. 44, distinguished; and *Harris v. Mudie* (1882), 7 A.R. 414, 421, referred to.—A reference as to improvements under mistake of title, and the amount by which the value of the land was enhanced, was directed: *Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 37. Stuart v. Taylor*, 20.

2. *Construction—Gift of Income to Wife for Life or Widowhood “for the Maintenance of herself and our Children”—Equal Division of Corpus among Children* upon Death or Re-marriage of Wife — *Obligation of Wife to Maintain Children—Discretion—Forisfamiliation or Marriage—Provision for Advancement to Sons upon Attaining Certain Age—Effect of Codicil—Postponement of Time for Division of Real Estate—Conversion of Real Estate by Trustees—Interest upon Sums Advanced — Security — “Loan.”*]—Under a clause in a will giving the testator’s wife for life or widowhood the income of his estate “for the maintenance of herself and our children,” it was *held*, that the widow was entitled to receive the income, subject to an obligation to maintain the children out of it, the manner and extent being left to her discretion, without interference so long as exercised in good faith.—Review of the authorities.—*Allen v. Furness* (1892), 20 A.R. 34, followed.—*In re Booth*, [1894] 2 Ch. 282, considered.—(2) That the widow was not bound to provide for the maintenance of forisfamiliarized or married children.—*Cook v. Noble* (1886), 12 O.R. 81, approved.—*In re Miller* (1909), 19 O.L.R. 381, overruled.—(3) By another clause of the will, the estate, upon the death or remarriage of the wife, was to be divided among the children, and provision was made for advancements to the sons upon attaining the age of thirty—each advancement to be considered as a “loan” from the estate. By a codicil, the division of the real estate was postponed until the lapse of ten years from the tes-

tator's death, and it was directed that the sons should manage the real estate and receive salaries:—*Held* (MAGEE, J.A., dissenting), that the intention of the testator was that, as far as it should be practicable to do so, his lands should be retained in specie and should be managed by his sons, and that the division of his estate, so far as it consisted of real property, should be postponed, if either of these events should happen within ten years after his death, until the expiration of that period—and that was the effect of clause 10 of the codicil; that the direction as to the payment to the sons was inconsistent with clause 10 of the codicil, so interpreted, and was *pro tanto* revoked; and that the executors and trustees were not bound to convert any of the real estate for the purpose of making payments to the sons, and would not be justified in converting it unless to prevent loss by depreciation or to pay incumbrances or debts. —(4) That, if there should be money available for making payments to the sons, they could not be required to give security for what they might receive, or to pay interest upon it. *Re Singer*, 602.

3. *Construction—Vested Interest — Enjoyment Postponed for Benefit of Estate.*—A clause in a will provided that the residue of the testator's property "be sold at such time and in such manner as may seem to my trustees best for my estate, it being left to their absolute discretion at what time and on what terms they

shall sell any of my said property, and on realising the same or any portion thereof to divide the proceeds among my wife and . . . children." The widow died before any of the residue of the property had been sold:—*Held*, that the share of the widow was vested, although the enjoyment was postponed, the postponement being for the benefit of the estate.—*Packham v. Gregory* (1845), 4 Hare 396, followed. *Re Ward*, 262.

WINDING-UP.

See COMPANY, 4, 5.

WITNESSES.

See EVIDENCE.

WORDS.

"Access."—See INFANTS, 1.

"Access to Streets, Avenues, Terraces, and Commons."—See DEED.

"Account of Lumber to be Shipped."—See BILLS AND NOTES, 2.

"Action."—See EXECUTION, 2.

"Cash Surrender Value."—See INSURANCE, 3.

"Commons."—See DEED.

"Direct Taxation within the Province."—See CONSTITUTIONAL LAW.

"Election."—See MUNICIPAL ELECTIONS, 1.

"Final in its Nature."—See APPEAL, 1.

"Flue, Stack or Chimney."—See MUNICIPAL CORPORATIONS, 6.

"For the Maintenance of herself and our Children."—See WILL, 2.

"*Franchise, Right, or Privilege.*"—See CONTRACT, 2.

"*Good Defence upon the Merits.*"—See JUDGMENT, 2, 3.

"*Guardian of an Infant.*"—See DITCHES AND WATERCOURSES ACT.

"*Loan.*"—See WILL, 2.

"*Owner.*"—See MOTOR VEHICLES ACT.

"*Preferential Lien of the Landlord for Rent.*"—See COMPANY, 4.

"*Proceeding.*"—See EXECUTION, 2.

"*Prospectus.*"—See CRIMINAL LAW.

"*Right of Access.*"—See INFANTS, 1.

"*Sell.*"—See LIQUOR LICENSE ACT.

"*Trustee.*"—See MORTGAGE, 1.

"*Upon.*"—See CONTRACT, 2.

WRIT OF SUMMONS.

See JUDGMENT, 2, 3.





